CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

FOR THE

DISTRICT OF QUEBEC,

IN

The Province of Lower-Canada,

IN HILARY TERM,

IN THE FIFTIETH YEAR OF THE REIGN OF GEORGE III.

1810.

Tuesday, Feb. 6th.

HERALD *against* SKINNER.

No *capias ad satisfaciendum* can issue on a judgment obtained by the *payee* against the *drawer* of a promissory note, though payable to *order*, the parties not being *merchants* or *traders*, and the note not purporting to be for value received in *goods wares or merchandize*.

A JUDGMENT was obtained in this Court by the plaintiff, a *tavern keeper*, against the defendant, *an officer in the army*, in Michaelmas term last, for forty pounds currency, with interest and costs, upon two promissory notes of the defendant payable to the plaintiff or his order. The plaintiff sued out a writ of *Fieri Facias;* upon which the Sheriff made a return of *nulla bona*, and the judgment remaining unsatisfied, a rule was obtained on the 1st. instant calling on the defendant to shew cause this day, why a writ of *Capias ad satisfaciendum* should not issue against him. The defendant was called

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and not appearing, *Vanfelson*, for the plaintiff, was heard in support of the rule; he contended that the plaintiff was, in this case, entitled to an execution against *the person* of the defendant under the Code Civile, and under the Provincial Ordinance, 25 Geo. III. c. 2. s. 38. which declares that "For "the satisfaction of all Judgments given in com- "mercial matters, between merchants or traders, "as well as of all debts due to merchants or traders "for goods, wares and merchandize, by them "sold, execution shall issue not only against the "goods, chattels, lands and tenements of the de- "fendant, but also, in case they shall not produce "the amount of the plaintiff's demand, against his "person." The original cause of action, he said, was clearly a *commercial matter*, the notes being drawn payable to order, and therefore *negotiable*, and that the parties *quo ad* the notes must be deemed *traders*.

SEWELL, Ch. J. It appears, upon the face of the proceedings in this cause, that the plaintiff is an *Inn Keeper*, and the defendant a *Lieutenant in the army*. The application is for a *Capias ad satisfaciendum*, upon a return of *nulla bona*, without any affidavit that the defendant is immediately about to leave the province; and upon the sole ground that the Judgment being founded upon two promissory notes payable to the plaintiff or his order, the defendant is liable to the *contrainte par corps*. The Ordinance of 1667, Tit. 34. Art. 4. allows the contrainte par corps "*pour dettes entre marchands pour fait de la marchandise dont ils se melent*:' And decisions in the Courts of France have settled that to entitle the plaintiff to the *contrainte par corps* upon a promissory note payable to order, both the drawer and payee, must be *merchants in point of fact*, (*a*)

(*a*) L. C. Denizart, v. 5th p. 447 to 450.—v. *Delhagonette*, and Hillier v. Bellier: JUD. MSS. See also Encyclopédie Methodique—Jurisprudence, v. 3. Verbo *Consulaire*.

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as well as in the case of ordinary dealings. Even taking it then for granted that we are bound by the Ordinance, we cannot, on this ground, award what is asked. If the plaintiff be entitled to a *capias ad satisfaciendum*, his right to it must rest upon the 38th Section of the *Provincial Ordinance*, 25 *Geo.* 3, *c.* 2. by which a *capias ad satisfaciendum*, upon a return of *nulla bona*, is allowed, 1st. "For the satisfaction of all Judgments given in commercial "matters between merchants or traders. 2dly, For "the satisfaction of all Judgments given for debts "due to merchants or traders for goods, wares and "merchandize by them sold." Now the defendant is not a merchant or a trader by profession, and the decisions of the Courts of law in France *in pari materia* to which we have adverted, do not permit us to consider him to be *quoad hoc*, a merchant or trader, the case therefore does not come within the first description; and as the note is expressed "for value received" *only*, and we have no evidence that this value consisted "*in goods, wares or merchandize sold*," we cannot consider it as coming within the second. The Rule therefore must be discharged.

Per Curiam,

Rule discharged.

HUNT *against* BRUCE and others.

Friday, Feb. 9.

In an action, upon an agreement for the sale of a cargo of coal, by a merchant, to an ironmonger and blacksmith, the trial and verdict of a jury may be obtained, under the Prov. Ord. 25, Geo. 3. c. 2, s. 38.

THIS was an action on the case, for the non delivery of a cargo of Coal which the defendants, who are merchants, had as alleged in the declaration, bargained and sold to the Plaintiff who is a blacksmith and ironmonger.

PLEA. The general issue.

On the 8th instant the plaintiff declared his option

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and choice to have and obtain the trial and verdict of a jury, under the Prov. Ord. 25 Geo. 3. c. 2. s. 9. which declares, "That all and every person "having suits at law, and actions, grounded on "debts, promises, contracts and agreements, of a "mercantile nature only, between merchant and "merchant, and trader and trader, so reputed and "understood, according to law, and also of perso-"nal wrongs proper to be compensated in damages, "may, at the option and choice of either party, "have and obtain the trial and verdict of a Jury, as "well for the assessment of damages on personal "wrongs committed, as the determination of mat-"ters of fact in any such cause, &c." and in consequence obtained a Rule, calling on the defendants to shew cause this day "why a Jury should not be "forthwith struck, according to the course and "practice of the Court, for the trial of the issue, "&c."

Ross, for the defendants, in shewing cause, contended that this case did not come within the letter of the Ordinance which grants the trial by Jury in cases of "a mercantile nature only, between "merchant and merchant, trader and trader, so "reputed and understood, according to law; and "in cases of personal wrongs, &c." The plaintiff, he said, was a blacksmith, or worker up of wrought iron, and as such had agreed with the defendants for the purchase of a certain quantity of Coal; which, though a necessary article to enable him to carry on his trade of blacksmith, was not to be resold by him or become an article of trade or traffic in his possession; the plaintiff was not, therefore, as to the Coal in question, a merchant or trader, and unless both parties are such, the Ordinance does not give the trial by Jury.

Bowen, in support of the Rule. A blacksmith and ironmonger is, and must be considered to be, in

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in every point of view, a dealer and trader. He most unquestionably is not in the situation of a mere journeyman, who bestows only his personal labour. A blacksmith not only furnishes labour, but materials, and afterwards abides the risque of the sale of the goods he has, as blacksmith, manufactured. Coals are absolutely necessary to carry on his trade; and, therefore, every contract for coal, for the purposes of his trade, is made in his character of blacksmith, and consequently of trader.

SEWELL, *Ch. J.*—This Rule must be made absolute. A Jury is allowed by law, (*a*) in any suit or action, between merchant and merchant, or trader and trader, which is grounded on debt, promise, contract or agreement, of a mercantile nature. The defendants, in this action, are merchants, and the plaintiff is a blacksmith and ironmonger, that is, a dealer in iron goods, which he buys and sells in the way of trade; the parties, therefore, are within the very letter of the Ordinance, and as the base of the action is alleged, upon the face of the declaration, to be an agreement between the plaintiff and defendants for "*the sale and delivery of a cargo of Coal,*" which the defendants refuse to accomplish, the action is plainly grounded on an agreement of a *mercantile nature*. *Per Curiam*, Rule absolute.

(*a*) Prov. Ord. 25. Geo. 3. c. 2. s. 9.

Monday, Feb. 12th.

HARTSHORNE and others *against* SCOTT and SOMERVILLE.

Where a suit is pending, in the Admiralty, against certain goods, seized as forfeited; and an action of trespass is brought against the seizors, for the illegal seizure of the *same goods*; the defendants may by an *exception dilatoire*, claim a *stay* of proceedings, in the latter, until the former is decided.

THIS was an action of trespass against the Collector and Comptroller of the Port of Quebec, for seizing, taking and carrying away, the goods

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and chattels of the plaintiffs, upon the pretence, as alleged in the declaration, that the same were forfeited, under and by virtue of, some, or one, of the laws of shipping and navigation.

To this action, the defendants pleaded an *exception dilatoire*, in which they set forth, that, in their qualities of Collector and Comptroller, they had seized, and instituted a suit or action in the Court of Vice-Admiralty of Lower Canada, against a certain schooner called the Beaver, her tackel, apparel, and furniture, and the goods, wares and merchandize, therein laden; for breach of the laws of shipping and navigation, and of the laws of trade and plantations; by which they had prayed that the same should be adjudged to be forfeited, and condemned; the which said seizure and suit or action were the same identical facts, upon which the present action of the plaintiffs was founded; that the said suit or action was then still pending in the Court of Vice Admiralty, and not discontinued, adjudged upon, or determined; and the legality, or pretended illegality of the seizure, and detention, of the Beaver and cargo, in no wise ascertained; and therefore concluding, that all proceedings in the present action, should be *staid*, until the suit or action, in the Admiralty, should be finally settled by the Decree of that Court.

The plaintiffs filed a general answer to this exception upon which the parties were now heard.

The Advocate General and Bowen, in support of the *exception* observed, that the proceedings in this cause, ought to be *staid*, until the Decree of the Court of Vice-Admiralty was pronounced, as should that Decree be in favor of the seizure, there will have been no trespass, and this action must then be necessarily dismissed.

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Stuart, against the *exception*, contended that *exceptions dilatoires* must have some positive law to support them, being always unfavourably received, as tending to retard the decision of a cause; in the present instance, no authority had been, nor could be produced to authorise the conclusions of the defendants exception. He cited 1. *Pigeau* 197.

SEWELL, *Ch. J.* the defendants have seized and libelled in the Admiralty a vessel and cargo, (the latter the property of the plaintiffs,) for an alleged breach of the laws of trade and navigation; and their suit is *still pending* and *undetermined* in that Court. The plaintiffs, however, contend that the seizure was an act of trespass, and have brought this action, for the recovery of the damages which they have thereby sustained. But it is not pretended that the Admiralty have not jurisdiction over the question, raised by the suit there instituted, upon the legality of the seizure.—That Court, then, having jurisdiction over this question, and being in possession of it, (*a*) and this question being the gist of the present action, can we do otherwise than delay the latter, until the former is decided? How great an absurdity would follow, if the plaintiffs should be permitted to proceed and recover in this action, and the seizure should afterwards be adjudged to be legal, in the due course of law?

Per Curiam, Let the proceedings be staid.

(*a*) Pigeau, 208, 201. also 89.

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Tuesday Feb. 13th.

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THIS was a special action on the case. The declaration stated, that the defendants, being merchants, did bargain and sell to the plaintiff who is a blacksmith and ironmonger, 112 chaldrons of New Castle Coal, to be taken per invoice; the same being the cargo of the Brig Anne, *Robert Weatherly* master, then in the Port of Quebec. That the defendants did covenant, promise, and agree, to deliver the Coal to the plaintiff on demand, at one of the wharves, in the city of Quebec; and that in consideration thereof, the plaintiff had agreed to pay to the defendants, thirty shillings, currency, for each and every chaldron. That the plaintiff was always ready, and did offer, to receive the said quantity of Coal, and to pay the defendants the stipulated price, and in every respect to conform to the agreement, and did demand and require of the defendants, to deliver to him the said 112 chaldrons of Coal. Yet the defendants, not regarding their promises, but intending to injure and defraud the plaintiff, and to cause him great hurt and prejudice in his trade, as a blacksmith and ironmonger, and to deprive him of the reasonable profit, which he otherwise would have made, upon the sale or other employment of the said Coal, had wholly failed, &c, to deliver, &c. when demanded, &c. to the damage of the plaintiff five hundred pounds.

The 17 *section* of the *Statute of frauds* (29 C. 2 c. 3) is in force in Canada, in *commercial cases*, as being part of the rules of evidence, laid down by the laws of England, to which in such cases, recourse must be had, under Ord. 25 Geo. 3 c. 2. s. 10. and therefore a sale of goods, for more than £10. stg. is not good, if no part of the goods contracted for has been delivered, no earnest given, nor any memorandum thereof made in writing.

PLEA, the general issue.

The action being grounded on a promise and agreement of a mercantile nature, and the parties being merchants and traders, the plaintiff, on a former day, had made his option and choice to have and obtain the trial and verdict of a Jury, under the Prov. Ord. 25 Geo. 3. c. 2. s. 9. (*a*) and having

(*a*) Ante. 3.

thereon

thereon moved for a *Venire*, the same had been granted, returnable this day.

The Jury being sworn,

Bowen, for the plaintiff, opened the case when it appeared that there was no note in writing of the agreement, no part of the coal delivered, nor any earnest given, and he was proceeding to prove, by parol evidence, the contract of bargain and sale declared on, when,

Ross, for the defendants, objected to the evidence offered, it being in proof of a *commercial matter*, and insufficient to support the declaration, under the *Statute of frauds*, (29. C. 2. c. 3. s. 17.) which established rules of evidence in certain commercial cases, and must be considered as in force in Lower Canada, by virtue of the Prov, Ord. 25 Geo. 3. c. 2. s. 10. That by the 17 section of the *Statute of frauds* it was enacted, "That no contract for the "sale of any goods, wares, and merchandizes, for "the price of £10. sterling or upwards, shall be "allowed to be good, except the buyer shall accept "part of the goods so sold, and actually receive "the same, or give something in earnest to bind "the bargain, or in part payment, or that some "note or memorandum in writing of the said bar-"gain be made and signed by the parties to be "charged by such contract, or their agents there-"unto lawfully authorized." He, therefore, contended, that as no part of the coal had been delivered, nor any earnest paid, nor any note or memorandum in writing made, the evidence offered of the alleged agreement, could not be received; and he cited *Rondeau v. Wyat*, 2. *H. Black. Rep.* 63. *Cooper, v. Elston*, 7. *Term. Rep.* 14. *Towers v. Osborne*, 1. *Stra.* 506. *Clayton v. Andrews*, 4. *Burr.* 2101.

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Bowen, for the plaintiff, contended that the *Statute of frauds* was no part of the law of Canada, and in no instance had been so considered, and, therefore all the english decisions, founded upon that Statute, were inapplicable to the present case. That the *Prov. Ord.* 25. Geo. 3. c. 2. s. 10, had not introduced into this country, the whole body of the English law, in commercial cases, but simply the English Rules of evidence, he, however, observed, that the question was new, and one he had not anticipated, and, consequently, was not prepared to argue, but he wished the trial might proceed, reserving for a future day the discussion of the objection offered.

SEWELL, *Ch.* 7. This cause, after argument, has been referred to a Jury, because the parties plaintiff and defendants, respectively, are a trader and merchants, and the action founded on an agreement of a mercantile nature; and as it is clear, that such a cause in France, would have been cognizable in the *Consular Jurisdiction*, it is, with respect to the proof to be adduced, within the principle laid down, by the decision of this Court in *Pozer, v. Meiklejohn*; (*b*) and recourse must be had, for the rules of evidence, to the laws of England.

The question, then, is this, is the *Statute of frauds* in this respect, in force in Canada; and does it apply to the case before us, the contract being executory? As to its being in force, the answer is obvious; it is unquestionably a part of the "rules of evidence laid down by the laws of England," to which, by Statute (*Ord.* 25 *Geo.* 3. *c.* 2. *s.* 10), it is enacted, "recourse shall be had in all the Courts "of Civil Jurisdiction in this Province in proof of "all facts concerning commercial matters." As to its being applicable to the case before us, the con-

(*b*) Post. p. 11.

tract

tract being executory; this question (which certainly has fluctuat d in Westminster Hall), has at length been put to rest, by the very able decision of the court of Common Pleas in *Rondeau, v. Wyatt*, (*c*) and the confirmatory Judgment of the Court of King's Bench in *Cooper, v. Elston*. (*d*) Evidence therefore must be given of some memorandum in writing, signed by the parties, or that some part of the coal purchased was delivered, or that some money was paid by the plaintiff to the defendants on account of the coal; the plaintiff cannot otherwise recover.

No evidence of either was offered, and the plaintiff therefore,

Per Curiam, was Nonsuited.

(*c*) 2. H. Black. 63.....(*d*) 7 Term. Rep. 14.

The decision, in the case of Pozer, v. Meiklejohn, *being referred to in the preceding Judgment, in* Hunt v Bruce and others, *it is inserted in this place, though the decision was anterior, in point of time, to the period, at which these reports commence.*

11th *April*, 1809.

POZER *against* MEIKLEJOHN.

IT was objected *at the enquête*, on the part of the defendant, that the case was not commercial, and that the evidence, offered by the plaintiff, was inadmissible, under the law of the Country in force at the time of the conquest.

The Chief Justice SEWELL, delivered the opinion of the Court as follows:

The plaintiff *Pozer* is a merchant, and alleges, in his declaration, that having purchased 77 hogsheads of beer, he stored them in the cellars of the defendant, *Meiklejohn*, who is a brewer, and he demands the value of the beer, and of the casks, on the ground of *Meiklejohn's* refusal to deliver them.

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transactions of tradesmen, artisans, &c. by way of trade, are to be considered commercial matters, & in such actions brought upon such transactions recourse must be had to the English rules of evidence, under the Ord. 25 Geo. 2. c. 2. s. 10. and generally in all cases which by the law of France were cognizable by the Consular jurisdiction.

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Meiklejohn, on his part, admits the receipt of the beer, and of the casks, and also his refusal to deliver them, in which he persists, alleging that *Pozer* after storing them in his cellars, upon his own account, sold the whole to him, and that he is ready to pay the price, at which he purchased. These allegations are denied by *Pozer*, and the principal inquiry, therefore, will be, whether the beer and casks were or were not so sold to *Meiklejohn*. But the immediate question, that, which we are *now* called upon to decide, turns upon the evidence offered by the plaintiff; and we are to determine, whether, in this cause, recourse shall be had to the common law of Canada, that is, to that law which was in force, in the province, at the conquest; or to the "rules of evidence laid down by the laws of "England." A recourse to the common law of Canada, is the ordinary rule, to the laws of England an exception created by Statute for those cases, in which, "proof is to be made of facts concerning "commercial matters." The 10 section of the *Ord.* 25. *Geo.* 3. *c.* 2. having enacted that, "in proof of "all facts concerning commercial matters, recourse "shall be had, in all Courts of Civil Jurisdiction "in this Province, *to the rules of evidence*, laid down "by the laws of England." If therefore the facts in this case be facts concerning *commercial matters*, we must be governed by the law of England, if not, by the common law of Canada.

In France, before the establishment of the Sovereign Council of Quebec, and particularly in the *Vicomté of Paris*, there were peculiar jurisdictions, (*Juges Consuls*) who were appointed "*afin de juger* "*les affaires de commerce.*" (*a*) It is true, that in the provinces, or districts of France, in which no *Juges Consuls* were appointed, all "*affaires de commerce*," as well as ordinary matters, were heard and determined by the ordinary courts of law; (*b*) but it is

(*a*) Juris. Consul. V. 1. p. 1....(*b*) 2. Pigeau 130.....Jud. MSS.

equally

equally true, that, when they were appointed, they held the exclusive cognizance of all commercial matters in dispute, and of no other. (*c*) Every matter in dispute therefore, to which, the jurisdiction of the *Juges Consuls* extended, was according to the law of France, a commercial matter or case, and all the facts, relating to such matters, were, consequently, "*facts concerning commercial matters.*"

Now the system of jurisprudence, which we administer, has for its basis, the law of France, and particularly, that portion, of the law of France, which was observed as law in the *Vicomté of Paris*, before the establishment of the Sovereign Council of Quebec; and as the distinction, between commercial and ordinary matters, is thus known in the law of Canada, it is a safe course, for the legal interpretation of that new rule, which, in such general terms, is prescribed by the Ordinance, (*d*) to enquire whether the case be, or be not, a matter which would have been cognizable, in the jurisdiction of the *Juges Consuls, as a commercial matter*, that being the best criterion, by which we may decide, whether the facts of the case be, or be not, "facts concerning "a commercial matter." The 16th Title of the Code Civile prescribes "*la forme de procéder,*" that is, the practice in the Courts of the *Juges Consuls*, and it is undoubtedly a fact, that the whole of this Title was abolished by the *Redaction*, "attendu que "cette jurisdiction n'est point établie dans le pays." (*e*) But this does not affect the conclusion to be taken, the enquiry is, what, according to the law of Canada, was an *affaire de commerce* or commercial matter? and not, what was the practice, or *forme de procéder*, in a commercial matter? What was a commercial matter, according to that portion of the law of France, which was in force in Canada, was such by the law of Canada, and although every such

(c) L. C. Denizart, Verbo—"Consuls des Marchands" S. 1. et 2. and authorities cited post.....(d) Prov. Ord. 25 Geo 3 c 2 s 10.
(e) Edits et Ord. V. 1. p. 140.....Jud. MSS.

case

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case was cognizable in the ordinary Courts, yet if a Consular Jurisdiction had been created, it would have claimed, and it would have held, the exclusive cognizance of such cases, as in France, under the pre-existing laws of the Colony; the form of proceeding, only, would have varied from that which is prescribed by the Code Civile.

Upon the principles stated, this will be found to be a very clear case. All tradesmen, by the law of France, were considered to be merchants, or rather dealers; and all suits, to which merchants and dealers were parties, and in which, the cause of action arose in the way of trade, were held, in the Courts of Paris, to be commercial matters, or *affaires de commerce*.

The *Edict* of 1563, which created the consular jurisdiction of Paris, enacts, "Que les Juges et "Consuls des marchands connoitront de tous pro-"cès et différents qui seront ci-après mus entre "marchands pour faits des marchandises seulement "privativement à tous Juges Royaux." (*f*) And the 4th Article, of the 12 Title of the *Ordinance of* 1673, which, in this respect, was merely declaratory of the law of France, as it then stood, and had long been practised, as shall hereafter be shewn, and being declaratory, is now cited on that account, and on that account only; is, in these distinct terms, "Les "Juges Consuls connoitront des différents pour "ventes faites par des marchands, *artisans* et *gens* "*de mêtier*, à fin de revendre, ou travailler de leur "profession; comme tailleurs d'habits pour étoffes, "passemens et autres fournitures; boulangers et "pâtissiers, pour bled et farine; maçons, pour "pierres, moëlon et plâtre; charpentiers, menui-"siers, charons, tonneliers, et tourneurs, pour "bois; serruriers, maréchaux, taillandiers et ar-"muriers, pour fer; plombiers et fonteniers, pour

(*f*) 5 L. C. Denizart 368. Col. 2d.....Jud. MSS.

"plomb,

" plomb, et autres semblables." (*g*) *Le Camus*, and the author of the *Jurisprudence Consulaire*, are equally explicit, " Sous le nom de marchand (says the " former) on doit comprendre les artizans et les re- " vendeurs, pour ce qui concerne leur commerce." (*h*) And the latter says, " Tous ceux qui achetent " pour revendre ou pour travailler de leur métier, " sont justiciables des consuls. Tous les auteurs " s'accordent sur ce point." (*i*)

It has been just now observed, that the 4th Article of the 12 Title of the *Ordinance of* 1673, was merely declaratory of the law of France, as it then stood, and had been long practised, and this will appear, upon reference to the *Arrêt* of the 12th of May 1657, pronounced, " *en l'audience de la gran-* " *de Chambre*," and reported in *Ricards Recueil d'Arrêts, Arrêt* 2*d*; (*k*) In this case the plaintiff was a tanner, and brought his action against two shoemakers to recover the value of a certain quantity of leather, sold to them, in the way of trade; and this was held, and determined, to be a case within the jurisdiction of the *Juges Consuls* of *Chalons*, where the sale was made; and not to be, within the jurisdiction of the *Prévôté of Chalons*, which, as the ordinary Court of law, had claimed cognizance of the suit, and was party to the Arrêt.

But, even admitting that, before the conquest, what, by the law of France, was a commercial matter, or *affaire de commerce*, was not to be so considered in Canada, because, in the peculiar law of Canada, there was no such distinction, still, as such a distinction is now introduced, the wisdom and experience of France, in the designation of her commercial matters, by her *Edits*, *Déclarations*, and *Arrêts* of her Courts of law, are the best and safest guides to the true construction of an Ordinance, by

(*g*) L. C. Denizart, V. 5. p. 869....(*h*) Ib. 449.....(*i*) Juris. Cons. 5. V. 17.....(*k*) Vide also Bornier. V. 2. p. 736. where the Arret is stated.....Jud. MSS.

which,

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which, this distinction has been made, by way of exception to the ordinary rules of evidence, which are derived from the law of France. Whether the Ordinance has gone beyond the law of France, or how far it has gone beyond it, we need not at present inquire, as the case does not call for it.

The application of the authorities which have been cited is too clear to require any comment; this is clearly a commercial matter, which would have been cognizable in the jurisdictions of the *Juges Consuls*, and in the proof of all facts concerning it, we must, therefore, have recourse to the rules of evidence laid down by the laws of England, by which the evidence offered is as plainly admissible.

In the foregoing Judgment the Court has declared that the Ordinance of 1673 was merely declaratory of the law of France as it then stood with respect to the Jurisdiction of the *Juges Consuls* in cases between merchants and tradesmen; this is very clearly established by *Toubeau* in "*Les Instituts du Droit Consulaire*," a Treatise cited by several late french law writers and considered to be a book of authority, as this work is very scarce, (there being but one copy in the Province, to my knowledge,) it may not perhaps be deemed improper to give a few extracts from it upon a point so important, for the information of those who may not have it in their power to have recourse to that copy.

Vol. i. page 331. Titre "De la Jurisdiction entre marchands et Artisans, et entre Artisans et Marchands"—"Boerius sur notre ancienne Coutume de Berry, *Titre de l'état et qualité des personnes*, § 4. nous dit que la différence qu'il y a entre un marchand et un artisan, est, que le premier achete les choses et les revend, *non mutatâ formâ*; et un artisan achete les choses et les revend, *mutatâ formâ*, comme celui qui achete du fer et en fait des Epées. Les artisans sont acheteurs et negocians marchands activement et passivement; car s'ils sont acheteurs des marchandises qui servent à la confection de leurs ouvrages et manufactures qu'ils en composent, qu'ils revendent, et qu'ils ne font que pour revendre, sont par conséquent justiciables des consuls privativement aux autres Juges. C'est pour la même raison que Maranta dit que les Patissiers et Boulangers doivent jouir des privileges des marchands."

Ib, page 332. "Mais la jurisdiction Consulaire s'étend sur les marchands et sur les artisans activement et passivement, en demandant et en defendant, comme entre Libraire et Relieur, entre Mercier et les ouvriers qui travaillent pour lui, dans les choses desquelles le marchand negocie, et des choses et matieres desquelles l'artisan a besoin pour travailler de son metier, et faire les choses qui entrent dans le Commerce: C'est aussi ce qu'Aristote chap. 7. de ses Politiques admet pour la troisieme espece de marchandise, qu'il appelle mercenaire."

"Quoique l'on ait fait tout ce que l'on a pû pour anéantir notre jurisdiction; que l'on ait mis en usage les exceptions, les interpretations captieuses de l'Edit, les distinctions des matieres et des qualités; neanmoins toutes ces subtilités n'ont point empêché que toutes et quantes fois que la question que je traite s'est presentée par devant nos Seigneurs de la Cour, ils ne l'ayent toujours jugé en faveur

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against
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faveur des jurisdictions consulaires. Je me contenterai de rapporter l'espece de cinq ou six arrests *qui ont précédé notre Ordonnance*; non pas pour faire cesser tout doute, notre ordonnance étant seule suffisante, et étant si claire qu'elle ne demande aucune explication; mais je joins ces arrests aux declarations que je viens de rapporter, pour faire voir que *ce n'est pas une nouvelle attribution que fasse notre Ordonnance.*

Ib. p. 336 et 337. "Je ne veux pas obmettre encore ce fameux et grand arrest rendu entre le Prevost de la ville de Sens et les Juges et Consuls de la même ville le 26 Aoust 1673. Sur ce que le S. Prevôt soutenoit qu'un *Potier d'Etain* ne pouvoit pas faire assigner un *Cabaretier* ou *Marchand de vin* par devant les Juges et Consuls, instance qui a duré près de quatre ans au Conseil d'état, quoique poursuivie de part et d'autre avec toute la rigueur imaginable, et avec tant d'eclat, *que c'est cette question qui a donné lieu à l'article 4 du 12 Titre de notre Ordonnance.* Cette affaire a été soutenue avec tant de générosité *par les Juges et Consuls, au profit desquels a été rendu cet Arrest*, qu'ils y depenserent dix mille huit cent six livres qui ont à la vérité été moderés à huit mille livres, par autre Arrest du Conseil d'Etat du 19 Aoust 1679, et le même Conseil a trouvé que ce Reglement étoit tellement de conséquence au particulier et au general de la ville de Sens, qu'il a jugé qu'il n'étoit pas raisonnable que les Juges Consuls et les Marchands supportassent seuls cette depense; de sorte qu'il est ordonné par le même arrest, après avoir liquidé cette somme qu'elle seroit imposée sur tous les contribuables au payement de la subsistance de la ville et Fauxbourgs de Sens, avec le courant des Deniers de la subsistance. Tout le royaume est principalement redevable de cet arrest Reglement et *même de cet article de l'ordonnance*, à la vigueur, à l'intelligence, à l'intrépidité de M. Bouvie marchand Apoticaire, qui mérite d'autant plus de louanges et de reconnoissances, qu'il avoit à faire à son Juge ordinaire et naturel, à un homme fort spirituel, sçavant et de grand crédit, avec lequel il fut obligé, en présence de M. M. les Conseillers d'Etat, non seulement de discuter et soutenir la matiere en question, mais même de maintenir l'honneur des marchands. Ce qui ne lui doit pas être peu glorieux et avantageux, il a fait voir et juger par Nosseigneurs du Conseil, que quand il n'y auroit que lui, il n'est pas vrai ce qu'on leur vouloit persuader que tous les marchands étoient des ignorans, gens sans lecture, ni langue latine. Aussi Mr. Bouvie reçut-il dans cette audience autant d'applaudissement et de satisfaction que Mr. le Prevôt y reçut de chagrin et de mécontentement; car il fut obligé de recourir à des choses plus fortes et plus touchantes que ses prieres et ses raisons, n'ayant pas voulu se rendre à l'exemple que l'on lui donna en plein-Conseil, que *M. le Chancellier de Sitery* avoit bien voulu *pour ne pas rompre l'ordre judiciaire*, procéder par devant les Juges et Consuls contre un *Jardinier*, qui étoit en demeure de lui delivrer cinq ou six cens pieds d'arbre qu'il lui avoit vendus.

Enfin donc notre Ordonnance pour faire cesser tous pretextes de Declaratoires et d'Appels, qui ne laissoient pas de s'interjetter journellement en cette matiere, *pour arrêter les opiniâtres, et convaincre les incrédules*, a voulu par l'article 4 du 12 Titre, lever toute difficulté, disant &c.

Ib. p. 366 et 367 Chap. 20. *Titre de la jurisdiction entre Artisans*, "En France, *même avant notre Ordonnance*, les Juges et Consuls ont connu des Procès entre *Artisans*. Du Fail rapporte un Arrest du Parlement de Bretagne du 18 Fevrier 1572, par lequel il fut defendu aux Juges et Consuls de Morlais de s'entremettre d'aucun exercice de jurisdiction, aux Hommes et Sujets de procéder devant eux, pour avoir connu une cause entre deux Boulangers; mais le Parlement fut obligé de se retracter, et lever ces defenses par autre Arrest du 28 Mars de la même année. Un autre exemple que je m'en vas en donner, est bien fort, entre Artisans dont le travail entre dans le Negoce et Commerce, cela a de fortes raisons; mais l'arrest que je vas rapporter fait voir que la Cour ne fait pas si étroitement cette distinction, la cause étant entre un Marbrier et un Sculpteur, parceque les choses que le Marbrier avoit fournies au Sculpteur, étoit une espèce de marchandise qui entroit dans l'ouvrage qu'il avoit entrepris, *les Consuls en furent les Juges.* S'il ne se trouve pas beaucoup d'Arrests sur cette matiere, c'est qu'elle n'a sans doute pas souvent été mise

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mise en contestation. L'espece de l'arrest que je vous viens de promettre est qu'Adriane Pré veuve de David Tacquemin vivant Marbrier, qui avoit fourni quantité de Sculptures qui étoient entrées dans un ouvrage et entreprise considérable, qu'Etienne Le Hongre maitre Sculpteur avoit faite dans l'Eglise des Celestins de Paris. Cette veuve Pré après la mort de son mary, fit donner Assignation à Le Hongre par devant les Juges et Consuls, où par défaut il fut condamné à payer la somme 630 livres restante de plus grande. Le Hongre de sa part se pourvut pardevant le Prevôt de Paris, qui revoqua la sentence des Juges et Consuls, fit deffenses aux parties de proceder ailleurs que pardevant lui, à peine de cinq cents livres d'amendes, depens dommages et interêts; deffendit de mettre la sentence des Juges et Consuls à execution, à peine d'interdiction; et en cas de contravention, permit d'emprisonner les contrevenans, et même la dite Pré, contre lesquels au dit cas l'amende de cinq cens livres demeureroit encourue, au payement d'icelle contraints par corps, nonobstant opposition ou appellation quelconque, sans prejudice d'icelles. De ces sentences du Prevôt de Paris Adriane Pré s'etant rendue appellante comme de Juge incompétent, la Cour par son Arrêt du 29 jour d'Aoust 1665, mit les Appellations des sentences du Prevôt de Paris au neant, emendant, ordonna que la Sentence des Juges et Consuls sortiroient effet, et condamna le Hongre en l'amende de douze livres."

Ib p. 398 Titre 17. "Afin de faire cesser les plaintes que les autres Juges portent tous les jours en tous les Tribunaux Souverains, et jusques aux oreilles du Roi, je veux faire connoître la Justice que ce grand monarque a voulu garder à leur égard, *et qu'il n'a rien innové à leur préjudice en faveur des Juges et Consuls par son Ordonnance et ses Reglements &c.*"

Ib. p. 266 Titre 15. "Nicolas de la Vigne *Imprimeur* fit donner assignation à Lavinier Pigoreau *Marchand Libraire à Paris*, pardevant les Juges et Consuls, pour se voir condamner à lui payer seize francs, restant de plus grande somme, pour vente et delivrance d'Heures. A cette assignation Pigoreau n'ayant pas comparu, il fut condamné par défaut le 31 jours de Mars 1631. Pigoreau se pourvut par devant les Auditeurs des Causes et Conseillers au Châtelet, où par Defaut obtenu contre De la Vigne, le même De la Vigne comparut et consentit la retention de la cause, et proceda par devant les dits Srs. Auditeurs, ce qui est à remarquer. Là les poursuites faites aux Consuls furent déclarées nulles, et De la Vigne condamné à l'amende, et à fournir, dans huitaine à Pigoreau la quantité des Heures mentionnées en leur marché, de même papier que les premieres feuilles, qu'il reconnoissoit avoir données pour montre, en payant par Pigoreau; autrement et le dit temps passé, seroit le marché résolu, et De la Vigne condamné par corps à rendre la somme de quarante quatre livres sept sols, qu'il avoit reçu d'avance. L'appel de part et d'autre de cette Sentence fut porté au Parlement de Paris, les Auditeurs et Conseillers du Châtelet, leurs procureurs et Greffier intervinrent, demanderent que deffenses fussent faites aux Juges et Consuls de prendre connoissance des causes personnelles qui n'excederoient pas vingt cinq livres, ainsi les renvoyer par devant les dits Sieurs Auditeurs, à peine de nullité, cassation de procédures, depens, dommages et intérêts; que l'Arrest qui interviendroit seroit publié tous les ans à la premiere audience après l'Election des nouveaux Juges et Consuls; qu'il seroit permis aux dits Sieurs Auditeurs d'envoyer un de leurs procureurs aux Audiences des dits Juges et Consuls, pour vendiquer et demander le Renvoy des dites Causes; et en cas de dény, appeller comme de Juges incompetens. Les Juges et Consuls intervinrent aussi de leur part, et demanderent d'être conservés dans le droit de connoitre des causes de Marchand à Marchand, conformement aux Edits et Declarations du Roi; et que deffenses fussent faites aux dits Sieurs Auditeurs d'en connoître, de casser les jugements et Ordonnances des Juges et Consuls, d'intimider les Parties ni les Huissiers pour empêcher de s'y pourvoir, et d'y donner des Assignations, à peine de nullité, depens dommages et interêts &c.

Sur le tout est intervenu Arrest le 17 de Septembre 1629, par lequel la Cour faisant droit sur l'Intervention et Demandes des Sieurs Auditeurs, Procureurs et Greffier du Chatelet, met les parties hors de Cour et de Procès, a maintenu et gardé les Juges et Consuls en la connoissance des Causes personnelles entre Marchands, et pour cause de Marchandise; et les dits Sieurs Auditeurs de toutes causes civiles et personnelles non excédant vingt cinq livres une fois payé,

payé, de marchandise privilegiée, vendue en gros et en détail, autre que de Marchand à Marchand. Defenses aux dits Sieurs Auditeurs et Consuls de prononcer par cassation de jugemens rendus, ainsi déferer aux Appellations aux cas des Edits." 1810.

OAKLEY *against* MORROGH and DUNN.

Wednesday, Feb. 14th.

Whether in a commercial case, a party can, under the existing law of Canada, examine his adversary on *faits et articles*?

IN this case, the plaintiff, on the 1st. day of term, obtained the permission of the court, to examine the defendants upon interrogatories on *faits et articles*, and the defendants being ordered to attend on the 8th. for that purpose, the defendant Dunn appeared and declined answering the interrogatories.

On the 13th, the cause being called, *Stuart*, for the plaintiff, moved that the *faits et articles* should be taken *pro confesso*, when

The Advocate General, for the defendant *Dunn*, opposed the motion, stating, as the ground of the objection to answer, on the part of *Dunn*, that the *Prov. Ord.* 25 Geo. 3. c. 2. s. 10. which declares, "that in proof of all facts, concerning commercial "matters, recourse shall be had to the rules of evi- "dence laid down by the laws of England," had done away, in *commercial cases*, the right, which, previous to the passing of that Ordinance, a party had, in all cases by the ancient law of the country, to examine his adversary on *faits et articles*. That the Ordinance having introduced the English rules of evidence, generally, in all commercial cases, of which description this action was, the plaintiff could only proceed according to those rules, which did not admit of any such examination as that for which the plaintiff now contended.

Stuart, for the plaintiff, observed, that in commercial cases the construction given to the 10th section of the Ordinance, relied on by the defendant,

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had always been, that an examination upon *faits et articles* was admissible, and this had been constantly recognized in practice; without it, justice could not be administered in this country, as it was the only manner in which a party could obtain the benefit of an examination of his opponent; the right to which was recognized and allowed by the practice and common law of the whole world. That the Ordinance had introduced the English rules of evidence in commercial cases, to which, such an examination as that contended for, was known; the only difference, here and in England, was in the mode of obtaining it; in England, the party must file his bill in Chancery, but here, he may file interrogatories. He said, there could be no doubt that the powers and functions of the Courts in England, as making one entire system, were all vested in the Court of King's Bench in Canada, it being the only court in the country to which a plaintiff could have recourse.

The case stood over untill this day, when the defendant Dunn declared he was ready to answer the interrogatories, and he was examined by consent.

The point was not therefore decided by the court, but they intimated their opinion so strongly, that the objection urged in this case by the defendant has not since been raised, and the parties in several instances have been examined on *faits et articles* in commercial cases.

Wednesday, Feb, 14th.

The lessee of a property, seized and advertised for sale by the Sheriff, cannot, by opposition *afin de charge*, claim that the property should be sold subject to the unexpired term of his lease.

BOGLE and others *against* CHINIC.
and
PROUX and BONENFANT, *Opposants.*

A Writ of *Fieri Facias* having issued in this cause, against the moveable and immoveable property of the defendant; on the 8th instant the Sheriff returned that he had seized and advertised for sale, according to law, the lands and tenements of the defendant, since which, he had received, on the part of

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Bogle and others *against* Chinic and Proux and Bonenfant, Op.

of *François Proux* and *Vincent Bonenfant*, the *opposition à fin de charge* annexed to his return.

It appeared by the return of the Sheriff, the opposition annexed, and the papers filed by the opposants, that a dwelling house and lot of land belonging to the defendant, in the lower town of Quebec, had been seized and taken in execution, at the suit of the plaintiff, the lower part of which house had been, by the defendant, on the 1st. of September 1809, by a notarial instrument or *acte*, leased to the opposants *Proux* and *Bonenfant*, for the term of four years, from the 1st of May, 1810, at the yearly rent of sixty pounds, under this special covenant, that the lessor should maintain the lessees in the quiet and peaceable possession of the premisses leased, notwithstanding any sale thereof that might be made by the defendant; under the penalty of all costs, damages, &c. under this lease therefore, *Proux* and *Bonenfant* opposed the sale, to be made by the Sheriff, of the said house and lot, unless the same were sold, subject to their lease, and the purchaser bound to permit them to hold and enjoy the lower part of the said house, as leased to them, during the remainder of the said term of four years.

The parties being at issue were now heard,

Berthelot, for the opposants,

Bowen, for the plaintiffs, who cited *Praticien François*, by Lange, 1. V. 330. 2. Pothier, 4to. 271. Louage, N°. 285.

Sewell, *Ch. J.* It is the right, *prima facie*, of an *Adjudicataire* by *decrêt*, to put out a lessee of the former proprietor, if he finds one in the possession of the property which he has purchased. (*a*) The

(*a*) 1. Pigeau, 753, 774. 1. Lange 330... L. C. Denizart, Vol. III. p. 37. N0. 15 & 16... Jud. MSS.

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opposants *Proux* and *Bonenfant* are aware of this, and being desirous, that this right shall not enure to the *Adjudicataire* in this case, they require us to make the continuation of their lease a condition of the sale; this, however, is opposed by the seizing creditor, and as it is so, it is plain that the conclusions of the opposition, which go to this point solely, cannot be granted.

Per Curiam,

Let the opposition be dismissed with costs.

BAKER *against* YOUNG and another.

and

Several Opposants.

Friday, Feb. 16.

No motion, for an order to resell real property at the *folle enchere* of the *adjudicataire*, can be granted, unless notice thereof has been given to the *adjudicataire*.

THE plaintiff sued out execution against the defendants, upon a judgment recovered in this cause, and the Sheriff returned, that he had seized certain real property of the defendants, which had been by him sold and adjudged to Mrs. *Christian Ainslie Young*, but that the purchase money had not been paid; the Sheriff also returned and filed, with the writ of *Fieri Facias*, several oppositions *à fin de conserver*, on the part of different creditors of the defendants.

By the *Prov. Stat.* 41. *Geo.* 3. *c.* 7. *s.* 14, it is enacted, " that whenever it shall appear to the " Court, by the return of the Sheriff, that the pur- " chaser or *Adjudicataire* of any real property seiz- " ed and sold by the Sheriff, shall refuse or neglect " to pay the amount of his said purchase, in con- " formity to the terms and conditions of sale, the " said court is hereby authorised, upon motion of " the plaintiff prosecuting the sale, or of the defen- " dant, or of any *Opposant*, to order and adjudge, " that the Sheriff do proceed *de novo*, to sell the " said

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" said real property at the *folle enchere* or costs and " charges of the said purchaser or *Adjudicaire*."

Under this Statute, *Bowen*, for certain of the *opposants*, now moved, that the said real property, so sold and adjudged by the Sheriff, should, by an order of this Court, be resold by him, at the *folle enchere*, costs and charges of the *Adjudicataire Christian Ainslie Young*, to which order, he contended, a party was entitled, upon motion, without previous notice to, or a rule on, the *Adjudicataire* to shew cause, the same not being required by the Statute; the *Adjudicataire*, in the present instance, if she had had any thing to offer, was bound to have appeared on the return of the execution, and not having done so, she had been in default, and thereby tacitly admitted that she had no sufficient reason for not paying the purchase money. The facts of her purchase, and of her neglect to pay, were sufficiently established, by the return of the Sheriff, and there was now before the Court, all that was necessary to ground the order applied for.

SEWELL, *Ch. J.* It would be a departure from the first principles of natural justice, to condemn the *Adjudicataire* unheard, and this we should do, if we ordered a sale of the property, which she has purchased of the Sheriff, to be made at her *folle enchere*, without allowing her the means of shewing why the purchase money has not been paid, by giving her a day in court for that purpose. By the statute, we are "authorised *upon motion* to order that the Sheriff do proceed *de novo* to sell the property;" but this cannot be understood to mean any other than a motion *in the common course*, upon which all parties are entitled to the privilege of being heard and of which, therefore, previous notice must be given, on a day in court upon a rule *nisi*. The practice, in the Courts of France, required invariably that the *Ad-*

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judicataire should be summoned, (a) and this practice ought to be continued.

Per curiam, Motion dismissed.

Friday, Feb. 16.

TREPANIER *against* DUPUIS.

The possessory and petitory actions cannot be joined, and the vice is not cured by consent of parties.

THE plaintiff, by his declaration, setforth his title to a certain lot of land, alleging that he had been the proprietor and possessor thereof, since the 4th. of March, 1805, and that the defendant had, within the year preceding the action, and at different times before, committed divers trespasses thereon, by cutting down the trees, and erecting a log house and saw-mill, on the said land, and concluding that by the judgment of the Court it should be adjudged, ordered and declared,—First, that he the plaintiff, is the proprietor of the said lot of land; secondly, that the defendant be forbidden in future to disturb the plaintiff in his possession;—thirdly, that the defendant do remove the said log house and mill; and lastly, that he be condemned to pay damages by reason *of the trespass*, &c.

To this action a plea was filed by the defendant, taking issue as well upon the title to the land, as upon the alleged trespass; and the parties were this day heard *en droit* upon the issues raised by the pleadings.

Vanfelson, for the plaintiff.

The Advocate General and *Taschereau*, for the defendant,

SEWELL, *Ch. J.* The declaration in this case has

(a) See L. C. Denizart, V. 8. p. 603. NO. 2.—7. Pothier, 4to. 253.—1. Pigeau, 782...Jud. MSS.

blended

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blended the possessory and petitory actions together. The plaintiff proceeds upon his possession, and takes the usual conclusions of the action *en complainte*; but in the same declaration he sets forth *his title*, prays judgment upon it, and that he may be declared proprietor of the soil. This is in direct violation of the Code Civile; " Les demandes en complainte, " ou en réintégrande ne pourront être jointes au " pétitoire, ni le pétitoire poursuivi que la demande " en complainte ou en réintégrande n'ait été termi- " née et la condamnation parfournie et exécutée." (*a*) It is true, Jousse, in his commentary upon this article, has said, that, in his opinion, this prohibition extends to the Court only, and that all that is forbidden by it may be done by consent of parties. (*b*) But this distinction is not admitted, or even noticed by other commentators; nor is there any adjudged case in support of it; (*c*) and certainly, it is dangerous to hold in principle, that a rule, which the law has established upon grounds of public expediency, can be set aside, by the act of individuals.

Per Curiam,

All that part of the declaration and pleadings which related in any manner to the *pétitoire*, was declared null, and of no effect. And it was ordered that the parties proceed respectively to the adduction of the proofs of the facts, by them severally alleged upon the *possessoire* only.

(*a*) Tit. 18. Art. 5,..(*b*) 1. Jousse, 387...(*c*) See 1. Pothier, 4to. 112 & IV. 458. Ravaut, 71. 1. Pigeau, 171. Serpillon, 282-283. 1. Bornier, 131. Jud. MSS.

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BAKER *against* YOUNG and another,

and

BLACKWOOD, intervening Party,

and divers Opposants.

Friday, Feby. 16.

When at a sale of property taken in execution, the sale is stopped by the Sheriff, the last and highest bidder, at that period, does not become the *Adjudicataire* of, or acquire any right to the property put up, although the Sheriff may have acted illegally in discontinuing the sale. Nor can there be any sale, unless the bidding has been accepted, by the knocking down of the hammer, or some act equivalent to it. Nor can a defendant by *opposition* stop the sale of his property, upon the ground that the sum bid was not near the value of the premisses, unless the plaintiff & the several *opposants à fin de conserver* consent thereto.

A Writ of *Vendutioni exponas* having issued commanding the Sheriff to sell certain real property of the defendants, which had been by him previously seized, and taken in execution, under a writ of *Fieri Facias*, sued out by the plaintiff against the defendants, on a judgment recovered in this cause, he, in the usual manner, advertised the property so seized for sale, and gave notice that the same would be sold and adjudged to the highest bidder on Monday the 14th of August, 1809. On the 2d of October following the Sheriff returned, "That in obedience to the said writ of *Venditioni exponas*, he had after complying with the formalities required by law, proceeded on the said 14th of August last, in the usual manner, to the sale of the said real property of the defendants, commonly called the Distillery at Beauport, but that the same not having produced, as alleged by the defendants, near its value, three thousand and fifty pounds having been offered on the part of *John Blackwood* Esqr. as the third, last and highest bidder, the adjudication had not taken place, by reason of an opposition on the part of the said defendants, consented to by the plaintiff's Attorney." The *opposition* of the defendants was at the same time returned and filed by the Sheriff, in which they allege for grounds of opposition as follows, "Parce que la valeur du dit lot seroit considérable, et que l'adjudication faite, faute de la concurrence d'un nombre suffisant d'enchérisseurs, tendroit à la ruine des opposants et affecteroit essentiellement les intérêts de leurs créanciers, qu'il est de leur intérêt que le dit lot soit adjugé à sa valeur

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" valeur, au delà, ou au moins aussi approchant de " sa valeur que possible, ce qui ne peut résulter " que de la concurrence des enchérisseurs, surtout " de la Grande Bretagne où les Gazettes, dans les- " quelles l'avertissement du Sheriff auroit été inséré, " auroient été envoyées." A variety of *oppositions à fin de conserver* on the part of different creditors of the defendants were likewise returned and filed by the Sheriff, which had been duly signified to him after the property in question had been by him seized. Upon this return of the Sheriff, *Bowen* moved to file a petition in intervention on the behalf of *Blackwood* which, after hearing the parties, the Court permitted him to file: in this petition, after stating the seizure by the Sheriff of the Distillery at Beauport, and the advertising of the same for sale on a particular day, *Blackwood* alleged, that on the day fixed for the said sale, he did lawfully bid and become an *enchérisseur* of the said Distillery and premisses and after several biddings and *encheres* did then and there become, and yet remained, the last and highest bidder, or *dernier et plus haut enchérisseur*, thereof, for the price or sum of £3050, and did then and there become entitled to be the *Adjudicataire* of the said Distillery and premisses, and to have, hold, and enjoy, the same as his own property, paying therefor the said last mentioned sum of money; but that the defendants on the said day of sale, without any good and sufficient reason whatever, and contrary to law, filed an *opposition* in the hands of the Sheriff, formally prohibiting and opposing, under divers false and erroneous suppositions and pretences, the adjudication of the said Distillery, &c. so sold as aforesaid to him (*Blackwood*,) by reason of which opposition the Sheriff did not then, nor had he at any time since, adjudged to him the said Distillery, &c. as he was bound to do, and therefore he concluded, first, That the opposition of the defendants should be declared in all things null and void, and dismissed with costs; and secondly, that the

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the Sheriff should be ordered and directed to make a good and sufficient title to him (*Blackwood*) of the said Distillery, &c. upon his paying the said sum of £3050, &c. &c.

To this petition a general answer was filed by the defendants and opposants *Young and Ainslie*, and the parties being at issue were heard upon the merits of the Petition.

Bowen, in support of the petition, contended, that the opposition of the defendants to the adjudication, upon the grounds of a want of bidders, and of the premisses being of greater value than the sum bid by *Blackwood*, was no opposition in law, and that the Sheriff ought not to have received it at the moment of the sale, as by the Prov. Stat. 41 Geo. 3. c. 7. s. 11. the same should have been notified to him fifteen days previous to the sale; that in the present instance the defendants had taken upon themselves to fix the value of the premisses, and thereby prevent the execution and effect of the King's writ, and if such an interference could be allowed, a similar opposition might be made by the defendants to the execution of any subsequent writ, and so *ad infinitum*, and the ends of justice defeated. That the day fixed by the Sheriff for the sale of property taken in execution was peremptory, and the sale could not be postponed, unless there was an impossibility to proceed, as in the case of a want of bidders, *L. C. Denizart Verbo enchere. Sec.* 4. *Nos.* 1 & 4. *Repertoire de Jurisprudenee, Verbo, Enchere.* 1. *Pothier*, 4to. *p.* 654. *Traité du Contrat de Vente, c.* 2. *s.* 3. *No.* 516. *Pothier Coutume d'Orléans* 788, *Introduction au Titre* 21 *des criées, s.* 9, *No.* 64. But in this case no such reason existed, there were bidders, and *Blackwood* being the last and highest, the Sheriff ought to have adjudged the premisses to him, and having refused or rather neglected so to do, *Blachwood* had been compelled to apply to this Court for relief, and he trusted that by its judgment,

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ment, the Sheriff would be ordered to perfect the sale, and to execute the necessary title to *Blackwood* of the Distillery, &c. so contracted for, and acquired by the latter.

Stuart, on the same side, observed that in the present case, it was not necessary to advert to the french law, since the Prov. Ord. 25th Geo. 3. c. 2. had fixed and determined the law upon the point in question, and had superseded all other.—As between individuals, a similar conduct to that of the Sheriff in the present instance, would have been considered a breach of faith, how much more so might it be considered, when it was the act of a public officer, under the direction of a Court of justice. In the advertisement of the Sheriff, filed and in evidence, he saw sufficient to found the title of *Blackwood*, it was in these terms, " Now I do hereby give notice, " that the same will be sold and adjudged to the " highest bidder at the Court House in the City of " Quebec, on Monday the 14th day of August " next, at eleven of the clock in the forenoon, at " which time and place the conditions of sale will " be made known." By this the Sheriff had engaged that the premisses should be sold to the highest bidder on a particular day, a promise and engagement, on the part of the officer of this Court, which should have been complied with, unless some legal impediment had intervened to prevent it. Upon the return of the Sheriff it was stated, that after the usual formalities, the premisses had been set up, and that *Blackwood* was the third last and highest bidder, and consequently the Sheriff was bound to adjudge the premisses to him. In France the interference of the Court was necessary to complete the adjudication, but here, under the existing law, it was not necessary, and the conditions of the sale being complied with by the purchaser, the adjudication of the Sheriff was final. The Court, he said, would always look with a jealous eye upon *oppositions* made by defendants, and discourage every attempt to stop the

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the effect of the King's writ. It was true the plaintiff had consented to the opposition to the adjudication, but there were other parties whose consent was equally essential. The opposition in this case was clearly irregular and inadmissible, and ought not to have been attended to by the Sheriff, he should have closed the sale, on the day by him fixed, and adjudged the premisses to the then highest bidder, *Blackwood*, who was entitled to the performance of the Sheriff's engagement; and inasmuch as the Sheriff had omitted to do what clearly he ought to have done, the Court would consider it as done, and give the proper effect to it, by ordering the Sheriff to execute a title in favor of *Blackwood*.

Borgia, against the Petition, contended that the opposition of the defendants was, what, under the ancient law of the country, was termed a *Requisitoire*, and was not one of those mentioned in the *Prov. Stat.* 41 *Geo.* 3. *c.* 7. *s.* 11. the provisions of which did not reach it. That by the *Prov. Ord.* 25 *Geo* 3. *c.* 2. the Sheriff was placed in the same situation as the Court stood, under the ancient law, in the adjudication of property, inasmuch as it was therein declared, that the sale by the Sheriff should have the same force and effect as the *decrêt* by the Court. By the ancient law the bidder was bound by his bidding, but not the person selling, nor the Court, nor as in this case, the Sheriff, until the property is adjudged, which is an acceptance of the bidding; and inasmuch as the Sheriff, in the present case, did not adjudge, there had been no acceptance of the bidding on his part, and the petition of *Blackwood* ought therefore to be dismissed, unless a positive authority could be produced to shew, that the ancient law of Canada, in this respect, had been abrogated, which he denied, nor was the right of a remise d'enchere, which the Judge, under the ancient law, granted *ex officio*, or at the requisition of one

one of the parties, when the sum bid for the property did not approach its real value, in the least changed, and he cited *Duplessis*, 1 *Vol. Fe.* 16, *book* 5. *c.* 6. " *de l'Adjudication.*"

The Advocate General for the plaintiff, said that no odium could attach to the opposants, as the proceedings adopted by them were calculated for the benefit of their creditors, & of all concerned, by preventing the sacrifice of a valuable property: he asked whether it was not competent to the plaintiff to stop the sale, and the effect of the writ of execution, though there were biddings, by declaring that the debt for the payment of which the property had been seized, was satisfied; he contended that the plaintiff had such a right, and in the present case the plaintiff had been so far satisfied, that he had acquiesced in the opposition of the defendants, and consented to a *remise* of the sale for beneficial purposes.

Bowen, in reply, denied the right to claim a *remise* of a Sheriff's sale under the existing law, it having been done away by the Prov. Ord. 25. Geo. 3. c. 2 which gave no power to the Sheriff to postpone the sale, he however admitted, that the case would have been different, and would have afforded some colour for postponing the sale, if before the property had been set up, the consent to postpone had been given for want of bidders; but the property having been put up, the bidder *Blackwood* had acquired a right, which no consent of the plaintiff and defendants could take away: but if such consent could avail, still there were other creditors of the defendants who were *opposants*, and who ought to have been considered as *saisissants* equally with the plaintiff, and whose consent had not been obtained; As to the allegation of the defendants that the property in question was worth more than the sum bid, he said, the sum which had been offered by *Blackwood*, ought to have been considered as the true value of the premisses, no person having offered a higher sum.

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The case stood over until this day for the opinion of the Court which was now delivered as follows:

SEWELL, *Ch. J.* Upon a *Fi. Fa.* the Sheriff in this cause takes in execution, at the suit of the plaintiff *Baker*, a valuable distillery, and other immovable property, belonging to the defendants, situate at Beauport in this District, he proceeds to the sale in the usual manner upon a *Ven. Ex.* and there are three bidders, of which the last is *Blackwood*, the intervening party, but his bidding being no more than £8050, the defendants oppose the sale, or rather the adjudication, *(with the plaintiff's consent,)* upon the ground that the price offered is very greatly below the fair value of the premisses. This opposition the Sheriff admits, discontinues the sale, and makes a special return of his proceedings, in which he states, "*That the adjudication did not take place* by reason of the defendants opposition." Upon this return *Blackwood* has filed a petition in Intervention, by which he prays, that the property may be declared to be his, and that the Sheriff may be ordered to execute a title in his favor. The prayer of this Petition is the matter in dispute.

On the part of *Blackwood*, it is contended, that the opposition of the defendants was and is a nullity, and that upon the face of the return it is evident that the sale was perfected, that three biddings were made, and that he, being the last and highest bidder, is the legal *Adjudicataire*, and so entitled to the property. On the other side, that the opposition was a legal and sufficient cause to break off the sale, that the sale was not perfected, and that *Blackwood* consequently is not the *Adjudicataire*. There are thus two questions before us, 1st. whether the opposition was or was not a sufficient cause to stay the proceedings? and if it was not, then, 2d*ly* whether *Blackwood* be or be not the *Adjudicataire* of the property?

All oppositions to a sale by *decret* must be made before

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before it commences; *(a)* and so extensively true is this principle, that where the sale has once begun even satisfaction of the execution, by the payment of debt and costs, is held not to be a sufficient cause to stay the sale, if there be any *oppositions afin de conserver*. *(b)* Upon this ground, and upon the ground that the want of a sufficient consideration, (*la vilité du prix*) cannot in any instance impeach an adjudication, *(c)* I am clearly of opinion that the opposition, or rather the protest of the defendant, was not a legal cause to stay the proceedings, and that the Sheriff was not bound to notice it, notwithstanding the plaintiff's consent, the plaintiff being but one among many creditors who were equally parties to the suit, by *oppositions afin de conserver*, whose consent to stay the proceedings was at least equally necessary, and was not given.

The inquiry is thus reduced to the single question, whether *Blackwood*, under all the circumstances, can legally be held to be the *Adjudicataire*? and I think he cannot. The manner in which the Sheriff is to make Sale of immoveable property, taken in execution, is not at all prescribed by the Ord. 17. Geo. 3. c. 2. or 25 Geo. 3. c. 2. but by universal construction, it has been held, in all the courts of the province, that these statutes intended a sale by *licitation*, as was practised before the conquest, a *vente publique* by bidding in the course of a common auction; it follows then, that the *last and highest* bidder must be the purchaser, for that is the principle of all such sales, but it follows also, that the *highest* bidder cannot be ascertained, until the close of the sale; and this of itself implies the necessity of some formal intimation of that close. The Sheriff is intrusted to make the sale, and no time is prescribed by law within which it must be terminated;

(a) Ord. 25 Geo. 3 c. 2. s. 10.....(b) L. C. Denizart, V. 5. p. 690. No. 4.
(c) Ib. V. 6. p. 57. Ar. 6. Jud. M. S. S.

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the duration therefore of the sale is thus left to his discretion, and it cannot be closed without his assent; the property also, which is sold by the Sheriff, (or rather of which he makes sale,) is not transferred by him to the purchaser, (for it is neither equitably nor legally his,) but by the acts which he is directed and empowered to perform; among which is the act of *licitation*, which must, as well as the rest, be complete, and therefore must be perfected by the usual method of terminating the period for bidding, by the fall of the hammer, or by some act equivalent to it, by which, (to that intent) the assent of him who makes the sale is declared. In point of fact then, it is impossible to say, who is the last and highest bidder at such a sale, before it is closed, and if it is interrupted, and not resumed, the last bidder at the moment of such interruption, cannot legally be said to be the *Adjudicataire*, as it is impossible to say who would have been the last and highest bidder, if the sale had continued. For these reasons, it being clear that the sale in this case was not closed, I am of opinion that the intervening party *Blackwood* is not the *Adjudicataire*, and that this Petition must therefore be dismissed.

WILLIAMS, J. I concur entirely in the opinion given by the Chief Justice. The Provincial Ordinance declares, that the sale by the Sheriff shall have the force and effect of the *decret*, under the french law; but in this case there has been no sale; if the Sheriff has done wrong the parties must look to him. It is to be lamented the ordinance does not go the length to authorise the Sheriff to postpone the sale, but it is wholly silent on that point.

KERR, J. The question, submitted to our decision by the petition and answer, lies in a very narrow compass; if there was a sale by the Sheriff, the prayer of the petition must be granted; if not, it must be dismissed. When the petition was first present

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sented, I was of opinion it should not be received, as the return of the writ of *Ven. Ex.* has not stated, that any sale had been made; I then thought we could grant the petitioner no relief, and this proceeding therefore ought not to be grafted on the original cause; I am not now induced to alter my opinion. By the Sheriff's return, it appears the property never was adjudged at all, it is a solecism in language to say that there was a sale, when the lot never was knocked down and adjudged; the knocking down of the hammer is a ceremony used in all public sales by auction, it is this symbol which publicly declares who is the highest bidder, and that the property is transferred by the seller to the buyer. It has been contended that the Sheriff engaged in his public advertisement to sell to the highest bidder, and that the petitioner being such, he was bound to knock down the lot to him, and this is urged as a ground for our decree to convey the property to the Petitioner, on the payment of the highest price offered; but because the officer of this Court has not, in all things, acted in obedience to the writ of execution, is this a reason for the court to order a sale to take effect, when there was no sale? It is a fallacy to say that the petitioner was the highest bidder, he was so in one sense, and not in another, he was the highest bidder at the moment the sale was suspended, not at the time it was completed, for the solemnity never took place, by which the sellers assent to the sale was made manifest; how does the court know that £3050, was the *summum pretium* that would have been given, if the sale had been kept open? If the opposition had not been given to the Sheriff, and the sale had gone on for a minute longer, the property might have produced, a much larger sum. It is impossible on any grounds of law or of justice to the many persons interested in this suit that the prayer of this petition can be granted.

Petition in intervention dismissed with costs.

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GUAY *against* HUNTERS.

Friday Feb. 16.

Damages, for the non-performance of a special agreement, for the transportation of goods, where a part has been transported, delivered, *and accepted*, cannot be pleaded against an action on a *quantum meruit* for freight earned, upon such part so delivered and *accepted*. The party must institute a cross *demande*, or a separate action for such damages.

THE declaration, in this cause, contained two counts, the first, setting forth, that the defendants were indebted to the plaintiff, in the sum of £25, for the freight of 109 barrels of pot-ash, belonging to the defendants and brought from St. Roc to Quebec, in the plaintiff's schooner, in the month of May last, and delivered to, and *accepted* by, the defendants at Quebec; in consideration of which, the defendants undertook and promised to pay &c. The second count, *quantum meruit*.

The defence set up to this action by the defendants, was, that by a written agreement entered into between the parties, the plaintiff had engaged to go down with his vessel to St. Roc, and there take on board 164 barrels and 5 puncheons of pot-ash and bring and deliver the same to the defendants at Quebec, for which, he was to be paid by the defendants twenty five pounds. That the plaintiff did not take on board his said vessel, or bring up to Quebec, the quantity of barrels stipulated in the said agreement; but had only brought up and delivered to the defendants, 109 barrels; whereby the defendants had suffered damage to the amount of £17 : 5 : and that the defendants had already paid £5. to the plaintiff on account, so that there was now due to him the sum of £2 : 10. only which the defendants tendered and deposited in Court.

At the *enquête*, it was proved on the part of the plaintiff, that he did in fact bring up and deliver to the defendants, at Quebec, the quantity of 109 barrels of Pot Ash, which were *received* by the defendants. On the part of the defendants, the written agreement entered into by the parties, the non-performance thereof by the plaintiff, and the expence the defendants had incurred in procuring another vessel to bring up the Pot Ash left by the plaintiff

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at St. Roc, were proved. The plaintiff admitted that he had received 5l. on account.

At the hearing, *Vanfelson*, for the plaintiff, said he relied on the second count in the declaration, under which, the plaintiff was entitled to recover freight for the quantity of barrels delivered by him to the defendants. That the damages, which the defendants had set forth in their plea could not be awarded to them, under the issue raised between the parties, inasmuch as damages were not specifically claimed, and the Court could not grant *ultra petita*; that if any damages had been suffered, or could be claimed, by the defendants, they could only be made the subject matter of an incidental cross *demande* which the defendants had not set up.

Stuart, for the defendants, contended that the plaintiff ought to have brought his action upon the special agreement, implied promisses could only be raised where there are no express promisses, but supposing that a general *indebitatus assumpsit* lay in the present instance, the only principle upon which it could be supported, was the general one, *quod nemo debet alterius detrimento locupletari*: the plea, therefore, and the evidence, in this cause, met the very gist of the plaintiff's action, they shew that the plaintiff did not deserve to have of the defendants the sum demanded by the declaration, but only the sum tendered, being £2 : 10. An incidental demand would have been necessary, if the action had been any other than a general *indebitatus assumpsit*; and it was not now competent to the plaintiff, to object to the subject matter of the plea, as he had answered it, and proof had been, in consequence, ordered thereon.

The Court took time to consider the case; and on this day, the CHIEF JUSTICE delivered the opinion of the Court, as follows:

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The demand of the plaintiff is a *quantum meruit* for freight, to which the defendants answer, that *Guay* the plaintiff, made a special agreement for the voyage, and that he did not perform it. They have not however instituted a cross *demande*, for the damages which they suffered by the non-performance of this agreement, so that the sole question for our consideration is, whether, in this cause, the non-performance of the special agreement can defeat the plaintiff's right to recover, to the extent in which the defendants have benefited by his services, upon an implied agreement which is the foundation of the present action? And we think it cannot. The action, in this instance, is not brought upon the original contract, but upon a *quasi* contract, founded on the consideration of the benefit, which the defendants have received, and implied *from their acceptance of the cargo*, which the plaintiff brought to Quebec. The case is within the rule, laid down in Luke *v.* Lyde, (*a*) in which an implied undertaking was raised, *according to the principles of marine contracts*, on the grounds of beneficial service, and labour performed by the plaintiff for the defendant, and *by him accepted*, for which, no other than the plaintiff was entitled to recover. This rule has been recognised in the recent cases of *Molloy v. Backer*, (*b*) and *Liddard v. Lopes* (*c*.) and we know nothing in the law of Canada which militates against it; it would certainly be unjust if it were otherwise.

For the damages, occasioned by the plaintiff's non-performance of the original contract, the defendants have their remedy; but we cannot stop the present plaintiff in his course, to recover that which he has thus earned, until the defendants shall think proper to institute their action for the recovery of their damages.

(*a*) 2 Burr. 882....(*b*) 5 East, 322,
(*c*) 10. East, 529.

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The judgment, therefore must be entered up *pro ratâ*, for that proportion of the entire freight to be paid for 169 barrels of pot-ash, which the plaintiff has earned by the transportation of the 109 barrels received by the defendants.

Judgment in favor of the plaintiff for £11 11 3½ with interest and costs.

GAGNE' *against* BONNEAU.

Friday Feb. 16.

IN this action, *Gagné*, amongst other things, demanded of *Bonneau* the sum of ten pounds, being the price of two oxen sold and delivered to him.

The *prescription* of a year under the 127 article, and that of six months under the 126 article of the custom of Paris, do not extend to farmers who raise what they sell.

To this *demande*, *Bonneau* by an *Exception peremptoire en droit perpetuelle*, pleaded *prescription*, alleging that the period in which *Gagné* could legally make his demand, according to the 126th and 127th articles of the *Custom of Paris* had expired.

The sale of the oxen was in March, 1806, and this action was instituted the 27th May, 1809.

The parties were now heard upon the exception,

Panet, for the plaintiff,

Vanfelson, for the defendant,

SEWELL, CH. J. The 126th and 127th articles of the *Custom of Paris*, extend to persons in trade, to dealers who purchase and sell, and not to farmers who raise what they sell; (*a*) so that the exception upon this ground must be dismissed. But the *prescription annale* proceeds upon the presumption of payment, and every plea of *such prescription* must therefore contain an averment, that the debt demanded

(*a*) 1, Pothier, 4to. 362, No. 713.

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manded has been paid, with a tender of the defendant's oath in proof of it, by a *hoc paratus est verificare.* (1) To this the cases of the *Duke de Bouillon* reported in *Denizart, (b)* of *Mayrand* v. *Duberger, (c)* and *Monro,* and others v. *Place, (d)* decided in this Court, are expressly in point.

The exception filed in this case is defective in this respect, there is no averment of payment, and as the defendant has not so pleaded the *prescription* which he claims, as to entitle him to avail himself of it, his exception must upon this ground also be dismissed.

Per Curiam, Exception dismissed with Costs.

(1) Note. The general averment of the *exception peremptoire en droit,* viz. "All which allegations the said defendant doth hereby aver to be true and "well founded in fact and in law, and the same will verify, prove and main- "tain when *and as* this honorable Court shall direct," is a sufficient tender of the defendant's oath, and was declared so to be by the Court in the case of *Morrogh v, Munn, quod vide post in Easter Term,* 1811.

(*b*) L. C. Denizart, Verb. Prescription Nos. 101, 98 and 99.

(*c*) Mich. T. 48 Geo. III.....(*d*) Hilary T. 49. Geo. III.

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A defendant cannot be allowed to plead specially, that which amounts to no more than the general issue. And *payment* and *tender* must be pleaded by way of perpetual *Exception peremptoire en droit.*

THE declaration in this cause setforth, "That "by a written agreement made and entered in- "to between the parties on the 30th of June, 1789, "the plaintiffs did sell to the defendant, and the "defendant did purchase of the plaintiffs 20,000 "feet, *more or less,* of white Pine Timber, and "10,000 Pipe Staves, *more or less,* &c." That the plaintiffs had performed their agreement and had in fact delivered 54,904 feet of Pine & 6700 Staves, &c. but that the defendant had not paid, wherefore they prayed judgment for £3027, with interest and costs.

To this declaratiou the defendant filed a plea, entitled

titled *Défense au fonds en fait*, in which he pleaded,

1st. That he was not indebted; that he did not owe, and that he did not undertake as in the declaration setforth.

2dly. That he had not failed or made default in the performance of the agreement stated in the declaration.

3dly. That no greater quantity of Pine Timber than the quantity expressed in the agreement had been delivered to him, or, received by him.

4thly. That for the quantity of timber delivered vizt. 20,000 feet of Pine Timber and 6700 Staves, he had paid in part, and

5thly. That he had made a tender and *offre réelle*, of the balance, which the plaintiffs had refused, before the institution of the action.

The caption and conclusion of this plea were in the form prescribed for the *Defense an fonds en fait* by the Rules of practice, and no part of it was in the form prescribed for the *Exception peremptoire en droit*.

The parties being at issue, an application was made by the plaintiffs for a commission to examine certain witnesses in Upper Canada, when the Court suspended its order thereon, and directed that the cause should be inscribed upon the *Rolle de droit*, for a preliminary hearing *en droit* upon the pleadings, and

Ross, of Counsel for the plaintiffs, and

Bowen, of Counsel for the defendant, having been heard, the judgment of the Court was delivered this day by

SEWELL, CH. J. The case before us is the first in which a question upon pleading has occurred, since

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since the establishment of our present Rules and Orders of Practice; and this will lead us to a more extended consideration of the subject of *pleading* in general, than the case, under other circumstances, would call for.

LOGICAL, DISTINCT, and CONSISTENT PLEADING is essential to the right administration of Justice, and to facilitate the attainment of this important object, the several forms of pleadings, contained in the Appendix to the Rules and Orders, have been prescribed. The principles upon which these forms are founded, should be thoroughly understood, and I shall avail myself of the opportunity now offered, to explain them generally, before I deliver the opinion of the Court with respect to the particular points upon which we are to decide.

Every contested suit at law consists of the *demande* on one side, and the *defense*, upon the other.

The term *demande* implies the representation, and the claim of redress, which the plaintiff, in any instance, or suit at law, makes against the defendant, for or by reason of the *facts* which constitute his cause of action; and a *demande* is therefore said to be "the exercise of a right of action." (*a*) The term *defense* on the other hand, implies all that the defendant offers, by way of opposition or resistance against the plaintiff's *demande*. (*b*)

The matters which constitute the *demande* and the *defense*, in any case, are respectively setforth in the pleadings of the parties, which vary, according to the grounds upon which they are made, and the objects they are designed to attain. Pleading, therefore is the statement of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defence, exhibited in writing in technical form.

(*a*) 1. Pigeau, 33.
(*b*) 7 Pothier 4to. 14. Code Civile 5. Tit. Art. 1st. and 5th. Jud. M. S. S.

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It is the mode of alleging that, which is afterwards to become in evidence the support of the party by whom it is alleged, (*c*) or, a simple negatur of that which is alleged by an adversary; the former, being an affirmative, the latter, a negative pleading. (*d*)

An affirmative pleading consists of two parts, the *libel* and the *conclusion*. In the libel, (or *narration* as it is sometimes called) the facts which constitute the ground of the pleading, that is to say, the premisses, from which the conclusions in law are to follow, are alleged and setforth distinctly as to time, place, person, and circumstance; (*e*) without comment or argument of any kind. (*f*) And to the libel, which should contain all that is necessary to justify the conclusion and no more, is added the prayer of the pleader, in apt words, for that specific remedy or relief, to which, by law, the facts which he has libelled entitle him, and this is the conclusion. (*g*) A negative pleading, in like manner, consists of two parts; of a direct denegation of that to which it answers, and of the conclusion, which asks that relief or remedy to which the pleader will be by law entitled, if that, which he denies, be not verified.

In the Law of England, it is a general rule in pleading, "That a mere prayer of judgment with-"out pointing out the appropriate remedy, is suf-"ficient, and that the facts being shewn, the Court, "*ex officio*, is bound to pronounce the proper judg-"ment." (*h*) But the reverse of this rule is the principle of the law of Canada. With us the conclusions are held to be essential to the proceedings, (*i*) and must contain, *à peine de nullité*, all that the

(*c*) 3. T. Rep. 159. Doug. 278....(*d*) Hennecius in Pandectas, part. 2. S. 32. Brown's Civil Law, V. 1. p. 35....(*e*) 1. Pigeau 269. 270. 1. Gauret, 4. Code Civile, Tit. 2. Art. 1. & Tit. 20 Art. 1.
(*f*) 7th Pothier, 4to 55. Art. 4 c. 3. Code Civile Tit. 20 Art. 1.
(*g*) Repertoire, Verbo, *Conclure* 8vo. V. 14. p. 77.
(*h*) 4th East 502, 509. 5th. Ib. 270, 271. 1st. Chitty 243, 445.
(*i*) 14 Vol. Repertoire 8vo. p. 77. Verbo. *Conclure*, Jud. M. S. S.

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judgment of the Court must comprehend. (*k*) For although the conclusions may by the Court be allowed or rejected *in toto*, or modified and allowed in part, and rejected in part, (*l*) still what is omitted in the conclusions cannot be supplied by the Court, not even if it appears in substance in the body, or libel, of the pleading. (*m*)

The *declaration* is the first pleading in every case. It sets forth the facts which constitute the plaintiff's *demande*, and is always an affirmative pleading.

Pleas are the pleadings, which setforth the *defense* of the defendant, and these are sometimes negative, and sometimes affirmative. A negative plea denies the matters which constitute the ground or *fonds* of the plaintiff's *demande, and does no more*; but an affirmative plea *alleges some new matter*, which being proved, is of itself sufficient to authorise a judgment for the defendant, *notwithstanding the matters which constitute the ground or fonds of the plaintiff's demande*; and for the purposes of this distinction, the word *defense* is used in a second and limited sense; a negative plea being called a "*défense au fonds*," because it impeaches or denies the ground or fonds of the plaintiff's *demande* setforth in his declaration, in opposition to an affirmative plea which is called an *exception*, (from the latin excipere to exclude) because it does *not* impeach or deny the ground or *fonds* of the plaintiff's *demande*, setforth in his declaration, but alleges, and relies *entirely* upon, one or more new matters as cause why the plaintiff's suit should be delayed or dismissed, and hence the maxim *Reus excipiendo fit actor*. (*n n*)

(*k*) 14th vol. Repertoire 8vo. p. 78. Code Civile Tit. 2d. Art. 1st.
(*l*) 14. vol. Repertoire p. 78. and 17. Vol. p. 479 Verbo Demande. L. C. Denizart, Verbo *Conclusions* Vol. 5. p. 83. No. 2.....(*m*) 14 Vol. Repertoire, 8vo. p. 77. 78. 1. Pigeau, 399. 400.

(*n*) Henneccius Elementa Jur. Civ. p. 395. Tit. 13. Art. 1277. Henneccius in Pandectas part 2 8. 32. 7. Pothier, 4to. 14. De la Janneys, Vol. 11. p. 406. Tit. 29. Art. 629. L. C. Denizart, Vol. 8. p. 166. Verbo, *Exceptions*, Sec. 1. No. 1. 1. Pigeau. 150. Jousse, idée de la Justice Civile Tit. 3. part. 2. Sec. 1. Art. 5, page 63. Erskiness Institutes, p. 663.
(*n n*) Repert. 8vo. Vol. 4. p. 363. Jud. M. 8. 8.

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The only remaining pleadings permitted by the law of Canada, are *Answers* and *Replications*, the pleading which is put in by a plaintiff, in answer to an affirmative plea filed by a defendant being an *answer*; and the pleading, which is put in by a plaintiff, in reply to a negative plea, or by a defendant, in reply to a plaintiff's answer to an affirmative plea, being a Replication. (*o*)

Thus much being premised with respect to the pleadings which occur in the course of ordinary suits, the nature of each shall now be more particularly considered.

The *déclaration* is a specification of the matters that constitute the plaintiff's cause of action, an accurate and logical statement of his complaint or charge against the defendant, and of the remedy in law for which he demands judgment. In this pleading, the plaintiff is required, *à peine de nullité*, to narrate and libel distinctly, as to time, place, person, and circumstance, the several facts upon which he prosecutes, and which he intends to prove in evidence; (*p*) all of which he therefore offers "to ve- "rify, prove and maintain when and as the Court "shall direct;" averring the whole "to be well "founded in fact and in law;" and praying by his conclusion, that the Court, under the authority of its jurisdiction, will "compel the defendant to appear," and, "to answer unto him the plaintiff, of "(*i. e.* concerning) the *demande*, contained in his de- "claration," and will award to him the appropriate remedy in law, which he specifically setsforth and alleges to be the legal result of the premisses. (*q*)

By the King's writ or process *ad respondendum*, the defendant is summoned to appear and *to answer* to the *demande* of the plaintiff, contained in his de-

(*o*) Prov. Ord. 25. Geo. 3. c. 2. s. 13. ....(*p*) Code Civile, Tit. 11. Art. 1. I. Gauret, 4. Repertoire, 2. Vol. 8vo. p. 4. Verbo ajournement. Jud. M. 8. 5. (*q*) Rules and Orders p. 239.

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"claration;" (*r*) and if he appears, (to prevent a judgment against him by proceedings *ex parte*) he *must answer*, or shew, "*that by law he is not bound to answer.*"

This constitutes the first great division in pleas; and as it would be contrary to law, to compel a defendant to answer to a *demande*, who is not bound by law to do so, and consequently what no Court lawfully can do; "whether he be or be not bound to answer?" must necessarily be a preliminary inquiry in all cases, in which the defendant contends, "That he is *not* bound to answer." For which reasons, if he does contend, "That he is *not* by law bound to answer," he is required to file, *in limine litis*, his plea or pleas to this effect, *without answering the demande*; and from hence such pleas are sometimes called "*preliminary pleas*" (*s*) But as the principle allegation of every such plea is, "that "in this cause, the court of our Lord the King now "here, *by law cannot proceed*," (*t*) they are technically distinguished from pleas which answer the *demande* (and are thence called "*pleas to the action*") by the title of "*fins de non procéder.*" (*u*)

A preliminary plea, or "*Fin de non procéder*," from its nature, cannot, in any case, be a negative plea. A negative plea necessarily takes issue upon the facts stated in the declaration, and the defendant, by such a plea, instead of shewing "that he is not by law bound to answer," would in fact answer the *demande*. As the defendant must therefore plead affirmatively, the matter on which he relies for the support of his averment ("that he is not by law bound to answer") all *fins de non procéder* are *exceptions*.

For the same reason, (that is, because they can-

(*r*) Rules & orders, 191. ....(*s*) Ib. S. 7. Art. 7. p. 68.
(*t*) Ib. p. 234, 235.....(*u*) L. C. Denizart Vol. 8. p. 638. Verbo, *Fins de non procéder*. S. 1.....(*u*) Serpillon, p. 54. Note 2. Jousse Cod. Civ. Vol. 1. p. 182. L. C. Denizart, Vol. 8th. p. 638. Repertoire, Vol. 25, 8vo, p. 69. Jud. M. S. S.

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not answer the *demande,) Fins de non procéder* cannot put in issue the right of action, as it respects either the parties, or the subject of the suit; they have, in truth, relation to the court only, and are founded upon the principle *of some defect of authority in the court to compel an answer;* (*w*) the matter, which they allege, tending upon this ground solely, "*to defeat the present proceeding*," without inquiry whether the plaintiff hath, or hath not, a right of action; (*x*) and therefore, *fins de non procéder* do not pray, "that the action may be dismissed;" but, "that the "writ and process *ad respondendum*, and the declara- "tion, and each of them, be declared null and of "no effect whatever," or, "that all proceedings be "staid until &c." according to the legal import, and effect of the matter pleaded. (*y*)

Fins de non procéder are divided into three classes relating,

1*st*. To the jurisdiction of the court.

2*dly*. To the form of the proceedings.

3*dly*. To some exemption from the common obligation to answer, to which the defendant is entitled.

The defendant therefore may show, that he is not by law bound to answer to the *demande* of the plaintiff in his declaration contained, by pleading,

1st. That by reason of some matter, which he (the defendant) alleges and sets forth, "The Court by law "cannot proceed in the cause, nor compel him to "answer in any manner unto the *demande*, nor in "any way take cognizance of the action of the plain- "if any he hath &c," (*z*) *for want of jurisdiction*; and this is the *Exception Declinatoire*. (*a*)

(*w*) Serpileon p. 54. Note 2.....(*x*) Ib. p. 54 Note 2d.

(*y*) Rules and orders, p. 236. 1. Pigeau 162.

(*z*) Rules and Orders, p. 234.....(*a*) L. C. Denizart Vol. 8. p. 638. Verbo *Fins de non proceder*, Sec. 2. 7. Pothier, 17 Jousse C. C. Vol. 2. p. 182. Repertoire. Verbo Fin, Vol. 25. 8vo, p. 62. Serpillon p. 54. n. 2. Jud. M. 8. 8.

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2*dly*. That by reason of some *imperfection*, *defect*, or *want of form*, in the proceedings, as in the writ or declaration, which he specifically setsforth, and of some law rule or order, which he also setsforth, "the Court cannot proceed in the cause nor compel "him to answer, in any manner, unto the *demande*," *because the proceedings are null*; and this is the *Exception à la forme*. *(b)*

3*dly*. That by reason of some matter which he alleges and sets out, "the court cannot, *at this time*, "proceed in the cause, nor compel him to answer "in any manner unto the *demande*," because the matter so pleaded is such, as entitles the defendant, *at this time* by law, to an exemption from the common obligation to answer; and this is the *Exception dilatoire*. *(c)*

When *Fins de non procéder* are allowed, the *Instance* or suit is either suspended until the Court has authority to proceed, and to compel an answer, or the writ and process *ad respondendum*, and the declaration are declared to be null and of no effect; the defendant in the latter case being discharged or dismissed out of Court, and the plaintiff obliged to sue out a new process *ad respondendum*; but when they are overruled as frivolous, the defendant, within the time limited by the practice of the court, is bound "to answer to the plaintiff of the *demande* "contained in his declaration," by *a plea to the action*, of which we will now enquire. *(d)*

As that is a preliminary plea, or *fin de non procéder*, which questions the authority of the court to compel an answer, and *does not* put in issue the right

(*b*) Rules and Orders, p. 236. Jousse C. C. Vol. 1. p. 182. L. C. Denizart, Verbo, Fins de non procéder S. 2. Vol. 8. p. 638. Repertoire, Verbo, Fin. Vol. 25, 8vo. p. 62. 7 Pothier, 15.....(*c*) L. C. Denizart, Vol. 8. p. 638. Verbo Fins de non proceéder S. 1. and 2. Repertoire, Verbo, Fin, vol. 25. 8vo. p. 62. 7. Pothier 16. Jud. M. S. S. (*d*) Rules and Orders, Sec. 7. Art. 8. and 9. p. 68, 69.

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of action as it respects either the parties to the suit, or the subject matter of the suit; so, *e converso*, a plea to the action is that which *does* put in issue the right of action as it respects the parties, or the subject matter of the suit, and *does not* question the authority of the Court in any manner.

The right of action is put in issue by a negative plea, denying the case, stated in the declaration, in point of fact, or, in point of law; and all such pleas are "*Defenses au fonds*;" for as they contest the very ground or fonds of the plaintiff's *demande*, by denying the truth of the facts setforth in his declaration, or the validity of the law which he avers to be the result of the facts setforth; they are distinguished from the aggregate of pleas, which is implied by the word *Defense* in its general acceptation, and from all other pleas, by the particular descriptive title of "*Defenses au fonds.* (e)

The right of action is also put in issue by any affirmative plea, which setsforth and pleads any matter relating either to the parties, or to the subject of the suit, which of itself is sufficient *in law* to authorise a judgment for the defendant, notwithstanding the facts setforth in the declaration of the plaintiff; and all such pleas, for the reasons before given are *Exceptions*; (f) but as exceptions of this kind have a *tendency in law* to bar the plaintiff's action for ever, or to abate it, until the disability, or other effect of the matter pleaded, shall be removed, they are distinguished from that class of Exceptions, which under the title of preliminary pleas, or *fins de non procéder*, tend merely to show, that the defendant is not bound to answer; by the descriptive title of "*Exceptions peremptoires en droit*;" the word *peremptoire* (from the latin perimere to destroy) being used to express their legal effect. (g)

It is obvious that a defendant can have but two

(e) 7. Pothier, 14. (f) Vide Ante. p. (g) 1. Bornier, 39. 1. Pigeau, 151. Jud. M88.

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sources of defence, his own strength, and the weakness of his adversary; and consequently all pleas to the action must be either "*Exceptions peremptoires en droits*," or "*Defenses au fonds*"; the former comprehending all pleas to the action which are founded upon the defendant's own strength, that is, upon new facts not stated in the declaration, upon which, (having set them forth) they *tender an issue* to the plaintiff: the latter comprehending all pleas to the action which are founded upon the weakness of the plaintiff, that is, upon the intrinsic inefficiency of the case, which he setsforth in his declaration, in fact or in law, upon which *they take issue*.

As every *défense au fonds* refers entirely to the matter which is stated in the declaration, and is grounded wholly upon the insufficiency of that matter, in point of fact, or in point of law, to support the plaintiff's suit, a direct denegation of the fact, or of the law, is all that is requisite in such pleas, to put the right of action safely in issue, with respect to the defendant, and to throw the *onus probandi* upon the plaintiff. But where the *demande* must be answered by new facts, not stated in the declaration, the defendant, for his own safety, must necessarily set them forth with certainty as to time, place, person, and circumstance; for if he does not, the facts, on which he relies for his defence, cannot benefit him, because they cannot be shewn to the Court in evidence; it being one among the first principles of pleading, that the Court must judge *secundum allegata et probata*; and that although facts only should be stated in pleading, yet, all material facts must be set out, to enable the Court to declare the law, which arises upon such facts, and authorises a judgment for the defendant, (notwithstanding the facts setforth in the plaintiff's declaration,) and to apprise the plaintiff of what is meant to be proved, and thereby enable him to deny what is alleged, or to aver new matter in answer to it, and to come prepared with

with proof, according to the exigencies of the case. (*h*)

Pleas of "*défense au fonds*" are divided into two classes. 1st. "*Défense au fonds en droit*," which denies the law averred by the plaintiff to be the result of the matters stated in the declaration, (*i*) and 2dly "*Défense au fonds en fait*," which denies the truth of the matters stated in the declaration. (*k*) In the *défense au fonds en droit*, the defendant, "*for answer* "*au fonds* to the *demande* of the plaintiff in his "declaration contained," avers, "that the allega- "tions of the plaintiff and the matters and things in "his declaration setforth and contained, and each "and every of them, is and are wholly and altoge- "ther unfounded *in law* and not sufficient therein "for the plaintiff to have or maintain, against him "the defendant, the conclusions in his declaration "taken, or any or either of them, or the action of "him the said plaintiff in this behalf," and therefore (by his conclusions) "he prays that by the judg- "of the Court, the action of the plaintiff in this "behalf may be dismissed." (*l*) In the *défense au fonds en fait* the defendant, in like manner, "*for answer* "*au fonds* to the *demande* of the plaintiff in his de- "claration contained," avers, "that the allegations "of the plaintiff, and the matters and things in the "said declaration contained, and each and every of "them is and are wholly and altogether unfound- "ed in fact and untrue &c. and therefore" (by his conclusion) "he prays that by the judgment of the "court, the action of him the said plaintiff in this "behalf be dismissed." (*m*)

Pleas of "*Exceptions peremptoires en droit*" are, in like manner, divided into two classes, 1st. PERPETUAL *Exceptions peremptoires en droit*, and 2dly. TEMPORARY *Exceptions peremptoires en droit*; and

(*h*) Code Civile, Tit. 20, Art. 1. Chitty, 215.....(*i*) 7. Pothier, 14
(*k*) Ib.....(*l*) Rules and Orders, p. 214.....(*m*) Ib. p. 246. Jud. MSS.

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these distinguishing titles are derived from the legal effect of these pleas respectively. Both are equally peremptory because both equally destroy the action to which they are pleaded but their ulterior effect is not the same. A judgment, in favor of the defendant, upon a perpetual *Exception peremptoire en droit*, is a perpetual bar to the action in which it is pronounced, and hence the name of "*Exception perpetuelle.*" But a judgment, in favor of a defendant, upon a *temporary exception peremptoire en droit*, does no more than abate the plaintiff's action, until the disability, or other effect of the matter pleaded and allowed, is removed, and therefore, it is a bar to the action *for a time only*, and hence the title of *exception temporaire.* (n)

In the *perpetual exception peremptoire en droit*, the defendant, "*for answer*, unto the *demande* of the "plaintiff in his declaration contained," setsforth and libels the special facts which constitute the ground of his exception, which he offers to prove "when and as the Court shall direct," averring that by reason thereof, "the plaintiff *by law* cannot *at any time*, "have or maintain *any action* against him the defend- "ant, for, or by reason of, the matters or things in "his declaration setforth and alleged, or of any or "either of them;" and therefore (by his conclusion,) he prays "That *for the causes aforesaid*, by the judg- "ment of the Court, the action of the plaintiff in "this behalf may be dismissed." (o) In the *Temporary exception peremptoire en droit*, the defendant, in like manner, "*for answer* unto the *demande* of the plaintiff in his declaration contained," setsforth and libels the special facts, which constitute the ground of the exception, which he offers "to prove when "and as the Court shall direct," averring that by

(n) The Epithets "perpetuæ," and "temporales," were applied to exceptions in the Roman law.... Vide Harris's Justinian's Institutes, Lib. 4, Tit. 13, S. 8, p. 70.—Pothier's Pandects, vol. 3, p. 251.—Ferrieres Just. Instit. vol. 6, p. 274 to 278.—and Brown's practice of the Civil Law, 1st. Edit, Vol. 20, p. 32.

(o) Rules and Orders, 243, 244, Jud. MSS.

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reason thereof, "The plaintiff *by law* cannot, *at this* "*time*, have or maintain his action, against him the "defendant, for or by reason of the matters and "things in his declaration setforth and alleged, or "of any or either of them," and therefore by his conclusions he prays, "that *for the causes aforesaid*, "by the judgment of the court, the action of the "plaintiff in this behalf be, *for the present*, (*p*) dismissed,

Exceptions peremptoires en droit do not impeach or deny the case stated in the declaration, and therefore cannot in any instance involve, or call for any consideration of the intrinsic merits of that case; they invariably setforth some new matter which shows, (notwithstanding the matter setforth in the declaration) that the plaintiff's action must by law be dismissed, for the present, or for ever. But as the new matter, which they setforth, is sometimes foreign to the matter setforth in the declaration, and sometimes connected with it, they are distinguished (by reference to that which they allege, and on which they are respectively founded) into "*Fins de non recevoir*," and "*Fins de non valoir*." (*q*) those *exceptions* are *fins de non recevoir*, in which the matter setforth is sufficient in law (*whether the case stated in the declaration be true or false*) to authorise a judgment in the defendant's favor, dismissing the plaintiff's action for the present, or for ever, as where the defendant pleads, that the plaintiff is an *alien enemy*, which is a *Temporary Exception peremptoire en droit*, or pleads the long *prescription* of thirty years, which is a *perpetual exception peremptoire en droit*; (*r*) and such Exceptions are denominated *Fins de non recevoir*, because the matter, which they plead, shows that the plaintiff cannot legally be *received*, or admitted by the court to prosecute the suit which he has instituted. (*s*) Those Exceptions, on the other hand,

(*p*) Rules and Orders, 241, 242. 2. Pothier, 4to. p. 729. 1. Pigeau, 193. Repertoire, 8vo. Vol. 17. p. 419. Verbo. Demande.....(*q*) 1. Bornier, 39. Note 1.....(*r*) 1, Pothier, 346.....(*s*) 1. Pigeau, 165. Jud. MSS.

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are *Fins de non valoir* in which the matter setforth necessarily admits and confesses the case stated in the declaration, but avoids or discharges it, for the present, or for ever, and is therefore sufficient in law to authorise a judgment in the defendant's favor dismissing the plaintiff's action; as where the defendant pleads "Term for payment unexpired," which is an *exception peremptoire en droit temporaire*, or pleads "Accord and satisfaction," or "*chose jugée*" (*res judicata*) which are *exceptions peremptoires en droit perpétuelles*, and such Exceptions are denominated "*Fins* "*de non valoir*," because the matter, which they plead, shows, that although the plaintiff may have a legal cause of action hereafter, or heretofore had a legal cause of action, yet, that he cannot now avail himself of it. (*t*)

Fins de non recevoir, and *Fins de non valoir*, are thus sometimes, in their effect, perpetual, sometimes temporary: but the classes of *exceptions peremptoires en droit perpétuelles*, and *exceptions peremptoires en droit temporaires*, comprehend the entire list of *Fins de non recevoir* and *Fins de non valoir*, and the two latter are therefore subdivisions, only, of the two former.

To pleas of *Defenses au fonds en droit*, or *en fait*, because they are negative pleas and take issue, nothing can be offered on the part of the plaintiff but a general replication, (*u*) by which the issue being completed, the pleadings are concluded. But to pleas of exception, because they are affirmative pleadings, and tender an issue, the plaintiff must put in an answer, which is either general or special.

A general answer takes issue upon the matter of the exception, by a general denegation; (*v*) and

(*t*) 1 Bornier, 39....(*u*) Rules and Orders, 231.
(*v*) Rules and Orders, 220, 222, 224. Jud. MSS.

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such general answer completes the issue, and consequently concludes the pleadings; *(w)* but a special answer tenders a new issue by setting forth fresh matter in answer to the matter of the exception, which is sufficient to destroy it, and in such case, the issue is completed, by a general Replication, on the part of the defendant, to such special answer, *(x)* the Legislature having forbid the use of all further pleadings. *(y)*

The principles which I have stated decide the present case.

The declaration demands of the defendant a large sum of money, for the sale and delivery of a quantity of timber, under a special contract in writing.

To this, the defendant has filed a plea which he has intituled a *Défense au fonds en fait*, in which he pleads specially:

1st. That he is not indebted, does not owe, and did not undertake, as in the declaration is alleged.

2dly. That he has not failed, or made default, in the performance of the agreement declared on.

3rdly. That no greater quantity of pine timber, than that expressed in the agreement, has been delivered, to or received, by him.

4thly. That he has paid in part for the 20,000 feet of pine and 6700 Staves delivered, and

5thly. That he made a tender of the balance due which the plaintiff had refused before the institution of the action.

(w) Rules and Orders, Sec. 7, Art. 1, p. 73.....(x) Ib. 229.
(y) Ord. 25, Geo. 3, c. 2, s. 13. Jud. MSS.

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Of these answers to the declaration, three, viz; the 1st, 2d. and 3d. amount to the *Défense au fonds en fait*, and to no more. They are merely negative. They deny the allegations of the declaration, and disaffirm the very matter which the plaintiff, on the general issue would be bound to prove, in the first instance, in support of his action; and as this is all that they do, they ought to have been pleaded generally, in the form prescribed by the Rules and orders for the *défense au fonds en fait*. A defendant cannot be permitted to plead specially that which amounts to no more than a total denial of the charge.

Of the remaining answers, one alleges payment, and the other a tender or *offres*. Now a plea of payment is a *perpetual Exception peremptoire en droit*; (z) it is so, because it *does not* impeach, or deny, the ground or *fonds* of the plaintiff's *demande*, but on the contrary admits a cause of action, and discharges it by new matter, which is not stated in the Declaration, and which consequently it sets out, that new matter being a legal "*fin de non valoir*." To plead payment of a debt and at the same time to deny its existence is inconsistent; payment, therefore, ought not to have been pleaded, by way of *Defense au fonds*, but by way of *Exception* in the form of the *perpetual Exception peremptoire en droit* prescribed by the Rules and Orders. And the tender, or *offres*, for the balance, which is alleged, ought to have been pleaded in the same manner, because an *offre valable*, or tender validly made, is in law equivalent to payment. (a) The plea therefore is entirely defective.

The defendant by pleading payment, and tender, by way of *Defense au fonds*, deprived the plaintiffs of the benefit of putting in "an answer" to the new matter of his plea, to which they were entitled, and

(z) 1 Pigeau, 203; 1 Bornier, 39; 2 Argou, 473; 2 Domat, 290
(a) 1 Pothier, Obligations, No. 573. Jud. MSS.

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drove them to the necessity (if they noticed the plea at all) of filing a *general Replication*, that being the only pleading to a *Defense au fonds en fait* permitted by the Rules. *(b)* On the other hand, the plaintiffs, instead of taking advantage of the defendant's misconduct, as they might have done, have filed a replication to his plea, and they are thus as much in fault as the defendant; both parties have equally contributed to the irregularity of the pleadings, and a Repleader, from the declaration, must therefore be ordered, that being the point of pleading at which their mutual error commenced.

Per Curiam, A Repleader ordered.

Tuesday, February 20

BELAIR *against* GAUDREAU & WIFE.

A Notarial act executed *en brevet* does not create a mortgage.

THIS was an action *hypothicaire* in which the plaintiff by his declaration setforth, that one *Dominique Girard*, by his obligation made and executed *en brevet* on the 1st of September, 1804, before Faribault, Notary, and two witnesses, did acknowledge to owe to the plaintiff the sum of £9 18 2, which he did thereby promise to pay to the plaintiff with interest, and for securing the payment did mortgage and hypothecate generally all his property which he then possessed or might afterwards acquire. That on the 1st of April, 1808, he the plaintiff obtained judgment in this Court against *Girard* for the said sum together with interest and costs, amounting to £20 19 5, upon which judgment execution was sued out against the moveable and immoveable property of the defendant, which was afterwards returned by the Sheriff *nulla bona*. That at the time of executing the aforesaid obligation, *Girard* was owner and proprietor of a certain lot of land in the Bay of St. Paul, and which afterwards on

(*b*) Rules and Orders 231.

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the 16th of September 1806 (long previous to the judgment obtained against *Girard*) he sold and conveyed to the present defendants, and that therefore, inasmuch as *Girard* was the proprietor of the said lot, at the time of the making and executing of the aforesaid obligation in favor of the plaintiff, he the plaintiff by the acquisition of the said lot by the defendants, became their mortgage creditor for the amount of the said judgment, interest, and costs, and the defendants liable to pay the same, unless they should prefer to abandon the said lot of land, to be sold for the satisfaction of the said debt, which they had hitherto refused to do; and therefore concluding that by the judgment of the court the defendants should be condemned to pay the debt or to quit and abandon the land, within a reasonable delay to be determined by the Court.

To this action the defendants filed several pleas, one of which was a *Defense au fonds en droit*, upon which the parties being at issue were heard, when

Vanfelson, for the defendants, contended that upon the face of the plaintiff's declaration the present action could not be maintained, as the plaintiff did not in law acquire any mortgage or *hypotheque* upon the land in question under and by virtue of the obligation executed *en brevet* on the first of September, 1804, mentioned and setforth in the plaintiff's declaration, and therein stated to have been so executed. That no obligation *en brevet* could create a mortgage, and that it was only those *actes*, executed before two Notaries, or a Notary and two witnesses, of which the *minute* or orignal remains with the Notary, which could give a right of mortgage.

Berthelot, for the plaintiff, contended that by the obligation declared on, though executed *en brevet*, the plaintiff did acquire a mortgage or *hypotheque* upon

upon the lot of land purchased by the defendants from *Girard*, the same having been executed before a Notary and two witnesses.

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The Court took time to consider the point, and on this day the opinion of the Court was delivered by

SEWELL, CH. J. This is an action hypothecaire founded upon an obligation passed *en brevet*, before a Notary and two witnesses. Mortgages and all their consequences depend entirely upon the authenticity of their dates, and from hence arises the unquestionable principle "That no *acte sous signature privée* can create a mortgage;" and by parity of reason, no *acte* ought to create a mortgage, which in respect to the certainty of its date, is not more than equivalent to an *Acte sous signature privée*. Now in all cases, in which the original *acte* remains in the custody and keeping of the Notary, the date of that *acte* can be accurately ascertained by the Notary from the *minute* which he has kept, but if no *minute* is kept, and the *acte* is delivered *en brevet* to the parties requiring it, the Notary has no better means for establishing the date of the *acte* than any common witness. And thus, as to the certainty of its date, the *acte en brevet* becomes no more than equivalent to an *acte sous signature privée*. *Le Proust de Royer (a)* states distinctly, that an *acte en brevet* does not create a mortgage, "un autre privilege," says he, qu'ont les actes reçus "par des Notaires c'est qu'ils portent hypotheque, "mais il faut pour cela plusieurs conditions. Il faut "que ces Notaires aient qualité pour instrumenter; "il faut qu'ils signent leurs actes; *et il faut que les "actes ne soient point en brevet mais qu'il en reste "minute.*" On the contrary *Le Camus* in his new edition of *Denizart* has the following observation, "Il n'y a point de doute que l'acte passé en brevet "emporte hypotheque aussi bien que celui dont il "reste

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" reste minute, c'est ce qui est attesté par un acte de " Notorieté du Chatelet du 24 Avril, 1703." *(b)* But then it must be remembered that all *actes* passed before Notaries in France were, under the Edict of March, 1693, controlled and enregistered in a public office, in the *Bureau de Controle. (c)* That when an *acte* was executed *en brevet*, it was controled and enregistered *before* it was delivered to the parties, *(d)* so that the date of such an *acte* was the day on which it was controled, and no mortgage in point of fact was created, until the *acte* was enregistered. Let it be remembered also that *Mr. Pothier* is of opinion, that *actes sous signature privée*, acknowledged before Notaries by the parties, will create a mortgage, " *lorsqu'ils sont deposés chez un Notaire*," and not otherwise; *(e)* and that *Le Camus* himself admits that the originals of all *actes*, in which third persons are interested, which is particularly the case in mortgages, ought to be kept in some public office; " Le bien de la société [says he] exige que les " originaux de tous les actes qui interessent, ou qui " doivent naturellement interesser des tiers, soient con- " servés en quelque dépôt public et inviolable afin " qu'on ne puisse pas les soustraire, les alterer, ou " même seulement les tenir secrets au prejudice " d'autrui." *(f)* It is evident therefore that in France an *acte en brevet was more than equivalent to an acte sous signature privée*, the date being authenticated by enregistration in a public office; and as upon the whole we cannot consider an *acte en brevet* to be in Canada any more than equivalent in this respect to an *acte sous signature privée*, for the want of that enregistration in a public office, for which the law provided in France, we are of opinion that an *acte en brevet* does not in Canada create a mortgage.

Per Curiam, Action dismissed with costs.

(a) Dic. des Arrêts, 2. V. 640.....(b) 3. L. C. Denizart, 772.
(c) Repertoire, V. 40. p. 106, Edict of March, 1693, 2. Neron, 245.
(d) 5. Pothier, 422. L. C. Denizart, Verbo, Controle, Sec. 3. No. 6. V. 5. p. 514.....(e) 5. Pothier, 422.....(f) L. C. Denizart, V. 1. p. 184. Jud. MSS.

MURE

MURE & JOLLIFFE, Incidental plaintiffs, 1810.

against

WILEYS & HUNGERFORD, Incidental defendants.

Tuesday, Feb. 20th.

In an action of damages, for the non-performance of a special agreement in which a penalty is stipulated to be paid by the party failing, the penalty is not to be considered as stipulated damages, and therefore whatever loss is proved to have been sustained, whether beyond, below, or equal, to the value of the penalty, the plaintiff will have judgment for.

TO a *demande* in Chief, instituted by *Wileys & Hungerford*, for the sum of £155 7, alleged to be a balance due upon the sale and delivery of a large quantity of pine timber, oak timber, and staves, under a special agreement in writing, the defendants, *Mure & Joliffe*, filed a *Défense au fonds en fait*, and an incidental cross *demande*, in the last of which they on their part, alleged, that by the agreement, declared upon in the *demande* in chief, *Wileys & Hungerford* had covenanted, and agreed, to deliver, at Quebec, to them (Mure & Joliffe) certain quantities of pine timber, oak timber, and staves, on or before the 15th of June, 1809, *under the penal sum of* £200.

That the said *Wileys & Hungerford*, had not performed this agreement, but on the contrary had failed and made default therein; and that an action had thereby accrued to them, to have and recover, from *Wileys and Hungerford*, the entire damage occasioned by their breach of contract being £311, for which they concluded, praying to be admitted plaintiffs &c, as usual. To this incidental cross *demande* no answer whatever was filed by *Wileys & Hungerford*; and Mure & Joliffe, having obtained leave to proceed *ex parte*, the agreement for the timber and staves (dated the 4th of February, 1809, and in substance as stated in the incidental *demande*) was produced and proved at the *enquête*. It was further proved that no part of the pine, oak, or staves, had been delivered "on or before the 15th of June 1809;" that after the 15th of June and before the 1st of August following, the stipulated quantity of pine had been delivered, with 800 feet of oak instead of the 10,000 feet which the incidental defendants by their agreement had engaged to deliver, but that of the quantity

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MURE & JOLLIFFE, incl'tl plaintiffs, *against* WILEYS & HUNGERFORD, incl'tl defendants.

quantity of staves (which was 2,000) not one had been delivered. It was also proved that the price of oak timber and staves had very much augmented, between the date of the agreement, and the period fixed for the delivery.

On the 19th instant, *Bowen*, for the incidental plaintiffs, was heard *ex parte*. And the court having taken time to consider the case, the judgment was this day delivered.

SEWELL, CH. J. The sum to be paid by the party who should fail in the performance of the agreement of the 4th of February, 1809, setforth in the declaration as well of the *demande* in chief, as of the incidental *demande*, is distinctly stated, upon the face of that agreement, *to be a penalty*, the words being "under the penal sum of £ 200." And this effectually prevents us from considering that sum as liquidated damages. *(a)* The incidental plaintiffs are entitled therefore, by the law of Canada, to do as they have done, that is, to ask for general damages, exceeding the amount of the penalty, *(b)* as in England. *(c)* But, to entitle them to recover, they must prove the loss, sustained by them, to be beyond the value of the penalty, which they have not done. There is however sufficient evidence of loss sustained to the amount of £ 200 for which judgment must be entered up with costs.

Judgment in favor of the incidental plaintiffs for £ 200 and Costs.

(a) 1 Domat, 271, lib. 3, tit. 5, s. 2, No. 15; 6, L. C. Denizart, 704; Smith v. Dickenson, 3 Bos. & Pul. 630.....*(b)* Pothier, Obligations, No. 342; 4, L. C. Denizart, 566, Verbo, clause, s. 2, No. 2....(c) Lowe v. Peers, 4 Burr, 2228. Jud. MSS.

BURNS

BURNS *against* HART.

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Tuesday, Feby. 20.

Whereon Auctioneer puts up a registered vessel for sale, without naming his principal, and the same is adjudged, without any express condition as to the time and manner of executing the written transfer of such vessel, the auctioneer cannot recover, from the purchaser, the sum at which the vessel was adjudged, unless he procure, and deliver, to the purchaser a legal transfer of the vessel, executed by the owner, or by some person legally authorised for that purpose, according to the requirements of the register Act.

THIS was an action of *indebitatus assumpsit* brought by the plaintiff, an Auctioneer and Broker, against the defendant, a merchant, to recover the sum of £468 10 0 for the hull, and lower standing rigging, masts and yards, of a Brig called the Star, and for sundry lots of sails, rigging, blocks, anchor, and cables, being the price at which the same had been sold and adjudged, by the plaintiff to the defendant, at public Auction.

The declaration contained eight counts. The first, stated, that on the 17th of June last, the plaintiff sold and delivered to the defendant the Hull &c. of the Brig Star, as she then lay in the *Cul de Sac* at Quebec, for £215, to be paid on the 19th of the same month, and that the plaintiff then and there engaged to deliver to the defendant the register of the said Brig on the said 19th of June, or as soon after as required, on the payment of the said purchase money by the defendant, by reason whereof the defendant became liable &c, and being so liable undertook and promised &c. and the plaintiff averred, that althongh he had been always ready to perform and fulfill all he was bound to perform and fulfill, and had tendered and offered a legal bill of sale of the said Brig, and was then ready and willing to execute the same in favor of the defendant, and deliver to him the Register, on payment of the purchase money and price aforesaid. Yet the defendant had refused to pay &c. The second count, stated, that on the same 17th of June, at Quebec, the plaintiff publicly put up to sale the Hull &c. of a certain other Brig called the Star, on the conditions, 1st, That the highest and last bidder should be deemed the buyer thereof, without any warranty whatever on the part of the plaintiff. 2. That the said Brig should be at the risque of the buyer, from the time he was declared to be the highest and best bidder.

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8. That the purchase money should be paid on the 19th of the said month of June, and the Register then delivered by the plaintiff to the said highest and best bidder. It then stated, that the defendant was the highest and best bidder, and then and there bid for the Hull &c. of the said Brig £215, which was the most and last bidding at the said sale, and thereupon the defendant was declared by the plaintiff as the buyer thereof, who consented thereunto, and to the binding of the said purchase; by reason whereof he the defendant became liable &c. and being so liable, undertook &c. concluding as in the first count. The third count stated, that the defendant, on the 16th of the said month of June, in consideration of the sale, before that time by the plaintiff to the defendant, of the Hull &c. of another Brig called the Star for the price of £215, undertook and promised to pay the said sum, on or before the 8th day of July following. The fourth count stated, that the defendant was indebted to the plaintiff in £300, for goods, wares and merchandize, sails, anchors, cables, blocks, cordage, casks, hawsers, cambouses, tar, and rigging, for a vessel, before that time, sold and delivered by the plaintiff to the defendant, and being so indebted &c, he undertook and promised to pay &c. 5. count, goods sold and delivered generally. 6. count, *quantum valebant*. 7. count, money paid. 8. count, money lent. 9. and last count, *Insimul computassent*. Conclusion, that the defendant be condemned to pay to the plaintiff the sum of nine hundred and thirty pounds, with interest and costs.

Plea, the general issue.

The case being of a mercantile nature, the plaintiff made his option and choice of the trial and verdict of a Jury, and at the trial, in the last term, the following special verdict was found by a jury of merchants,

"The

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" The jury find for the plaintiff in the sum of " two hundred and forty-eight pounds ten shillings, " the amount of sundry lots sails, rigging, blocks, " an anchor and cable, bought of him by the de- " fendant on the 17th of June last. The jury also " find, that, on the same day, the plaintiff adjudged " to the defendant, as the last and highest bidder, " the hull, masts, and yards, of the Brigantine Star, " for the sum of two hundred and fifteen pounds, " on the condition, that the said vessel was to be, " from the moment of being adjudged, at the sole " risk of the purchaser; and that the plaintiff did " not at the time name his principal. The jury fur- " ther find, that the defendant took possession of " the vessel, and subsequently promised to pay the " whole amount of his purchase, and repaired and " offered her for sale; and also, that the plaintiff " offered to execute, in favor of the defendant, a bill " of sale of the vessel, in his own name, and that of " *John Dapwell Hamilton*, acting for the owner of " said vessel, of the tenor of that filed by the plain- " tiff in this cause, being exhibit N° 2—That one " of the conditions, of the sale of the said ves- " sel, was that the register should be deliver- " ed upon the Monday next following the sale, " at the counting house of the plaintiff, upon pay- " ment of the purchase money by the defendant, " and that the defendant did not call for the same, " and that the plaintiff hath at all times been ready " to deliver to the defendant the said register, and " that the same was ready to be delivered, on the " Monday following by the plaintiff to the defen- " dant, at the counting house of the plaintiff, and " that the defendant did not call for the same. And " the Jury submit to the judgment of the Court the " point of law regarding the transfer of the hull of " the said vessel. And that, if upon the whole " matter now found, the Court shall be of opinion, " that the plaintiff has cause of action for the said " last mentioned sum of two hundred and fifteen

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"pounds, then the jury find for the plaintiff in the "said further sum of £215, if otherwise, then for "the defendant, in so far as respects the said sum "of two hundred and fifteen pounds."

The exhibit N°. 2, alluded to in the foregoing verdict, and produced and proved at the trial, purported to be a Bill of sale from the plaintiff, *William Burns* and *John Dapwell Hamilton*, Esquire, acting for and in the name of the owner of the Brigantine or vessel called the Star, to the defendant, in which, it was setforth, that the Star had been bought by, and adjudged to, the defendant, at public auction, for the sum of £215, and in consequence, that they the said *Burns* and *Hamilton* for and in consideration of the said sum did as much as in them was, and they lawfully might, grant, bargain and sell, &c. to the defendant, his heirs and assigns, the said brigantine Star, &c. The said bill of sale also contained a copy of the certificate of Registry, whereby it appeared, that *Alexander Gordon*, of Bridge Town in the Island of Barbadoes, was the sole owner of the said Brigantine.

This verdict was argued, in the present term, by *Bowen* and *Stuart* for the plaintiff, and *the Advocate General* for the defendant, the following is the substance of the arguments upon the point reserved by the Jury, for the opinion of the Court.

Stuart, for the plaintiff, observed that there were two points of difficulty, the first, arising out of the provisions of the Register Act—the second, how far the vendor is bound to transfer the property after a positive sale. These two points were closely connected. He contended that, in the present case, the defendant could not say he was not the proprietor of the vessel, inasmuch as he had exercised the right of ownership, and would in that case be a trespasser. The jury had found, that the defendant had taken possession

possession of the vessel, and for aught that appeared to the Court, he might be then navigating her; and what recourse remained to the plaintiff? this proved the principle of the law laid down in Pothier, (*a*) that after delivery it was not competent to the purchaser to contest the right to sell, unless he be disturbed. The Register Act fixed the manner of conveying property in vessels and has prescribed the form of the transfer, but *did* not annul the transaction of sale as between the seller and purchaser.

In Courts of equity the provisions of the Register Act were less rigidly enforced than in Courts of law, and this Court, exercising an equitable jurisdiction, would enforce a sale, where honesty required it should be enforced. In a case in *Vezey* junr. it had been decided that a transfer was null because there was no endorsement, and the party was liberated, as otherwise it would be encouraging fraud. But if there could be a doubt on the arguments already submitted, the subsequent promise of the defendant, to pay the purchase money, puts it out of doubt. *Pothier, Traité des Ob.* N°. 457, *and seq.* that there was a consideration for the promise was evident, as the defendant had the use and possession of the vessel; a subsequent promise of a widow, in support of a promise made by her in the life time of her husband had been held good. 1. *Pothier*, 237. "*Traité des obligations*," N°. 464.

Bowen, on the same side, contended, that taking the Register Act in its strictest sense, the present case did not come within the Statute, as it was the sale of a *Hull*, and not of a vessel that was seaworthy and to be navigated. The plea to the action was *non assumpsit*, and the only question, upon the issue raised, was, whether the defendant undertook and promised as stated in the declaration? there was a great distinction between the sale of a ship, and that of a hull of a ship, and the verdict only found that

(*a*) Pothier, Contrat de vente, Art. préliminaire, &c. No. 48.

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a hull had been sold. In this case, a bill of sale had been tendered by the plaintiff to the defendant, and it must be considered to have been a legal bill of sale. It was in vain that the defendant now contended, that the person, acting for the owner, was not legally authorised, this could not be presumed. The hull was sold as a common chattel, and not as a ship, and the plaintiff could therefore give the title. *Williams v. Millington*, 1. *H. B. Rep.* 81. That the defendant had taken possession of the hull, and had repaired and offered it for sale, under a title acquired from the plaintiff, and he could not then be at liberty to contest that title. In this case the defendant had chosen to go to an expence, which the owner or his agents had not, by rendering the vessel once more seaworthy, this he was at liberty to do; and therefore, the Register had been given to him; but the hull, only, had been sold. He concluded by saying, that the completion of the contract, on the part of the plaintiff, had been fully established by the verdict.

The Advocate General, for the defendant, observed that there was no resemblance between the facts found by the verdict, and the allegations of the declaration, the former, he said, went beyond the latter, and that, being the case, the verdict was bad, as the jury could not find beyond the issue, or any facts that were not pertinent thereto. 2. *Bacon's Ab. letter D Special Verdict.* The verdict and declaration varied, as by the former, nothing was said of any warranty, on the part of the seller, as stated in the declaration; nor in the declaration was it stated, that at the time of the sale, the plaintiff did not name his principal, and yet it was so found by the verdict. It was the same, with regard to the subsequent promise of the defendant to pay, of which no allegation could be found in the declaration. He contended that when an article was sold, of which the transfer is specially regulated by law, it must be presumed, that

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that the title which the law required, would be given unless there was an express stipulation or condition to the contrary, at the time of the sale; the answer of the defendant, in the present cause, had always been, "shew me your authority to sell, and give me a legal title, and I will pay the money." The case, cited from *H. Black.* was the sale of a simple chattel, he admitted the principle there laid down, but denied that it was applicable to sales of ships, for the transfer of which, the law had specially provided. The parties were not now contending in a Court of Equity, but in a Court of law, and there would certainly be no justice in condemning the defendant to pay the purchase money and compel him afterwards to seek his title, he added, that in the bill of sale tendered by the plaintiff, the Agent of the proprietor of the vessel was named, but no such disclosure was made at the sale, nor did the plaintiff then name his principal, and he cited *Hanson v. Roberdeau*, *Peakes, N. P.* 120. He therefore contended that under the whole circumstances of the case, the plaintiff not being authorised nor able to give a bill of sale of the vessel, according to the requirements of the Register Act, he could not recover, from the defendant, the sum demanded, as the price of the vessel.

Stuart, in reply, said, that the defendant admitted the adjudication, but denied that there had been a legal sale; the verdict however had found the facts necessary for the support of the plaintiff's action, and that finding was conclusive. The principle, contended for by the plaintiff, had been decided in England upon a sale of real property, *Gilbert's action of debt*, 363. where *B* was compelled to pay the purchase money, and left to his action of covenant against *A*, to give and complete the title. When a person acted in the name of another, the presumption must be, that he had an authority to do so, and he was bound to produce and maintain that authority; the case,

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mentioned in *Pothier*, of the sale of real property, for which the vendor could not shew a title, was applicable. He contended that the defendant, having taken possession of the vessel after the adjudication, and subsequently promised to pay the purchase money, closed the transaction as to the defendant; for when in the case of a debt contracted by a *femme coverti*, she is benefited, an action will lie against her for the amount, after the death of her husband. In the present instance, the time, which would have been required to procure a title from the owner who resided at a distant port, would have led to a total loss of the vessel, and consequently an immediate sale was necessary, therefore a reasonable time must be given to the plaintiff to procure the title or an authority from the owner to execute it.

The Court on this day delivered their judgment.

SEWELL, *Ch. J.* The circumstances of this case are such, that it will not decide any of the questions which have been raised at the bar, upon the Register Acts. It stands upon other grounds.

In the purchase and sale of ships, the person, who takes upon himself to sell, must have power to sell, and to transfer the owner's right of property for although a sale of goods, or other moveable property, by the person who is in possession, does, in many instances, vest the property in the buyer, even when the seller has neither property in what is sold, nor authority to sell; this cannot take place with respect to a ship, *when sold as a ship*, (*a*) though it may with respect to the materials of which a ship is formed, when it is broken up or is become a mere wreck. (*b*)

Now, it is certain, that the Star was both sold and bought, not as a mere wreck, but, *as a Ship*, and that she was capable of repair. This is certain,

(*a*) 1. Abbott, p. 1.....(*b*) See Reed, v Darby, 10 East. 143.

because

because she specifically subsisted as a ship, at the time of the sale; because one of the conditions of the sale was, that the Register should be delivered to the purchaser, which could only be for the purposes of navigation; and because she has since been repaired. It is material also to observe, that at the time of the sale, *nothing was said, as to the transfer of the property*, and that in this respect, the case must therefore rest upon the common principles of Ship Sales.

Upon these grounds, we hold, a valid conveyance of the Star, to the defendant, to have been an implied condition, in the contract between the parties; and as it is evident, that, without title, the ship cannot be of any value to the purchaser, because so situated, the real owner would have a right to claim her at any time, and be entitled to recover, (*c*) we hold the execution and delivery of a sufficient title, and the payment of the consideration, to be mutual and reciprocal engagements, to be performed at the same time.

Then, what is the title which has been tendered? It is a deed, purporting to be a conveyance by Mr. *Burns, the Auctioneer*, and by Mr. *Hamilton, the consignee of the Ship*, to the defendant; But it is not contended, *that, by the circumstances of the case, they are enabled to convey*; and it is not shewn, *that any authority, to make the transfer, is derived to either of them from the owner*. The consideration of the defendant's undertaking has therefore failed, no valid title has been or is tendered, and the plaintiff, therefore has not cause of action for the sum, at which the Star was adjudged by him.

WILLIAMS, J. I concur in the opinion given by the Chief Justice; the defendant could not send the vessel out of this port, without having previously

(c) See Reed v Darby, 10 East. 143.

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procured a new Register in his name, which could not be obtained from his Majesty's officers of the customs here, without exhibiting to them a legal transfer of the vessel, (according to the requirements of the statute) vesting the property in the defendant; and for the want of such legal transfer made by the actual proprietor, or by some other person duly authorised by him, to execute the same in favor of the defendant, the pretended sale of the vessel is a nullity.

KERR, J. This is an action brought by an auctioneer to recover the sum of £215, being the price for which a ship called the Star, and her apparel, were sold and adjudged to the defendant, as the highest bidder at a public auction. The defence set up is, that the plaintiff has not given a bill of sale, in conformity to the requirements of the Statutes of the 26th and 34th Geo. III.

If ships were like chattel interests, transferred by delivery, the plaintiff would, by the facts found in this special verdict, be entitled to recover, having put the defendant in possession of the property adjudged. But ships, from very early times, have been like land, considered as a kind of property which must be evidenced by written documents; this was so in the french law, and is now the law of all the maritime nations of Europe. In ours various acts of Parliament have regulated, in what manner titles shall be made to this species of property, and after reading the statutes of the 26th and 34th of the King, it is difficult to conceive, how it could be supposed, that any thing like a transfer of this ship had taken place. The facts found do not conceal that *Alexander Gordon* is the real owner; his name appears on the face of the certificate of Registry, as the person vested with the right of property in the ship, how then could the plaintiff and *John Dapwell*

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well Hamilton divest this property out of the owner, without a legal written authority? Could they in conformity with the seventeenth section of the 34 Geo. 3. c. 60, execute a valid indorsement on the certificate of Registry? The question is easily answered, that A cannot assign over the property of B, without a legal procuration to that effect. And whether we consider this as a transfer or contract, or agreement for transfer of property in the ship, we are equally called on, to declare it is void, and that the plaintiff cannot recover. The 15 section declares, "that "such indorsement shall, from and after the first "day of January, 1795, be made in the manner and "form herein after expressed, and shall be signed "by the person or persons transferring the property "of the said ship or vessel, by sale, or contract, or "agreement, for sale thereof, or by some person, "legally authorised for that purpose by him, her or "them, and a copy of such indorsement shall be "delivered to the person or persons legally autho-"rised for that purpose by him, her or them, and a "copy of such indorsement shall be delivered to the "person or persons authorised to make registry, and "grant certificates of Registry, otherwise such sale, "or contract or agreement for the sale thereof, shall "be utterly null and void to all intents and purpo-"ses whatsoever." *Lord Eldon in Woodward, v. Larking*, 3, *Esp. Rep.* 286, observes, that the policy, of the Liverpool acts, was to have evidence of *real* property. Now here, the defendant could have nothing but an *equitable* title, which, under the letter and spirit of these acts, is no title at all. It has been urged, that this was a sale from *necessity*, and that the formalities of the Register Acts must, from the same cause, be dispensed with. Nothing of that kind appears on this special verdict, and besides, where sales in a foreign port, and in extreme necessity, have been sanctioned, it has been a sale by the master, and not by a person assuming to be an authorised agent, without shewing any document which gives

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gives him that power. Nor is it more difficult to answer what is stated by the plaintiff's counsel, that the vessel was sold as a hull, and not as a ship, for the transaction shews clearly, that the plaintiff set her up to public sale, for the purposes of navigation; and if it were competent to dispose of Ships, as Hulls or wrecks, without giving any other title than possession, I fear the policy and plainest provisions of the Register acts would be defeated. I am, on the whole, of opinion, that the ship never was legally transferred, and that of course, judgment must be entered up for the defendant.

Tuesday, Feb. 20.

Where a third person promises to one of the parties to a contract that he will assume it, that promise can only be binding upon him as to the person to whom the promise was made; and a contract to deliver to certain persons during a fixed period all the malt that they may require for their brewery, can only be binding as long as malt may be required for the brewery, and therefore the insolvency of such persons, and their ceasing to employ the brewery terminates the contract, and no damages can be claimed upon the ground of subsequent non-performance.

OAKLEY *against* MORROGH and DUNN.

AN agreement was entered into by the plaintiff, and *Robert Lester*, and *Robert Morrogh*, merchants and copartners, under the firm of *Lester & Morrogh*, on the 27th of January, 1807, at Quebec, by which it was covenanted by and between them that he, *Oakley*, should and would make and deliver to the Cape Diamond Brewery at Quebec, such quantity of pale and brown malt from barley, as *Lester and Morrogh might require* during the term of five years, which were to commence on the 1st of October, 1807, they *Lester & Morrogh* finding him with all manner of materials necessary for the making of the malt, save and except labour which was to be found by *Oakley*, for which he should receive three pence per Winchester bushel after the delivery of the malt in a good state for brewing, and for the faithful performance of this agreement the parties bound themselves each to the other in the penal sum of £300.

Subsequent to this agreement Messrs. *Lester & Morrogh* became insolvent, and from the middle of September, 1808, ceased to employ *Oakley* as Maltster of the Cape Diamond Brewery, about which time

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time also *Lester* died and *Morrogh* was appointed Curator to his vacant estate.

For the non-performance of this Contract the present action was brought by *Oakley* against *Morrogh* as well in his own name as in his quality of Curator to the estate of his deceased partner, and against *Dunn*, who had become the sole proprietor of the Cape Diamond Brewery, for the recovery of the stipulated penalty, and also for a further sum of £300. damages, he, *Dunn*, having, as alleged in the declaration, assumed and taken upon himself the said contract and undertaken to do and perform all that *Lester & Morrogh* were thereby bound to do and perform.

To this action the defendants severally filed a defense *au fonds en fait*, and at the *enquête* in addition to the facts before stated, it appeared that the assumption of the contract on the part of *Dunn*, if any such had taken place to the extent alleged in the declaration, rested solely on a verbal promise made by *Dunn* to *Morrogh*, in a conversation which took place between them, to which *Oakley* was not a party.

Stuart, for the plaintiff, and the *Advocate General* for the defendants, having been heard: the Court on this day delivered the following judgment,

SEWELL, *Ch. J.* The action is against *Morrogh*, as one of the original contracting parties and the representative of the other (*Lester*) and against *Dunn*, as assignee of the contract. It is a contract *synallagmatique* (or reciprocal) by which *Oakley* engages, "to malt such quantities of barley, as *Lester & Morrogh* may require, from time to time, during the term of five years," in consideration of which *Morrogh* for himself and *Lester* undertakes, "to furnish all the materials for making the said malt and to pay him three pence per bushel." And to the performance

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formance of these engagements each party binds himself to the other in the penalty of £ 300.

With respect to *Dunn*, there is no evidence that he promised at all to assume the contract, if he did promise it was to *Morrogh*, not to *Oakley*, and therefore if any action lies, it must be by *Morrogh* against *Dunn*, for refusing to perform the contract as he promised. No action can lie for *Oakley* against *Dunn* because he *(Oakley)* was not a party to the contract as to *Dunn*. This is evident because *Dunn* had no means of compelling performance from *Oakley*, and consequently *Oakley* can have none to compel *Dunn* to perform the contract, and he cannot therefore support an action for the penalty for non-performance.

As to Morrogh, the question is this, is there evidence to shew that *Lester and Morrogh* have required any and what quantity of Barley to be malted? and admitting that by *required* we must understand "required for the Brewery," there is no evidence that any was required; the sole testimony on this point is Morrogh's Answer to the fifth Interrogatory on *faits et articles*, in which he says, "that the in-"solvency of *Lester and Morrogh* prevented them "from continuing to employ *George Oakley* from "September 1808, to the end of the contract," which clearly implies that none was *required*. Upon these grounds the action, as to both, must be dismissed.

KERR, J. As it respects the Defendant, *Morrogh*, this is an action of covenant, and as it regards *Dunn*, an action of *Assumpsit*. I do not see how an action can be maintained against the Defendant, *Dunn*, on an agreement to which he is no party. There is no privity of contract between the Plaintiff and him, and, of course, there can be no judgment rendered against him.

With respect to the Defendant, *Morrogh*, the contract

tract between the Plaintiff and *Lester and Morrogh*, must be construed according to its spirit: Now what was the intention of these parties? It was that so long as *Lester and Morrogh* should carry on the Brewery, at Cape Diamond, the Plaintiff should "*make such quantity of pale and brown malt, from* "*barley*," as they should find necessary for brewing. But the insolvency of *Lester and Morrogh* in September, 1808, and the subsequent sale of the Brewery rendered it no longer necessary for their concerns to have malt made, and put an end to the contract between the parties.

END OF HILARY TERM.